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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOHN DOE, by and through his parents and next friends, JANE DOE and JOE DOE, and the class of all others similarly situated,

Petitioners,

v.

BOARD OF EDUCATION OF OAK PARK & RIVER FOREST HIGH SCHOOL DISTRICT 200, NANCY SMILEY, DONALD OFFERMANN, STEPHEN C. BRUNER, both in their official capacities and as individuals, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER, PURSUANT TO THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT ("IDEA"), 20 U.S.C. §1400 et seq., JOHN DOE, A QUALIFIED STUDENT WITH A DISABILITY, WAS ENTITLED TO CONTINUED ALTERNATIVE EDUCATIONAL SERVICES AT PUBLIC EXPENSE WHEN HE WAS EXPELLED FROM HIS PUBLIC SCHOOL PLACEMENT IN SEPTEMBER, 1994?

II. ALTERNATIVELY, WHETHER THE 1997 AMENDMENTS TO IDEA, WHICH CLARIFY THE RIGHT TO A CONTINUED EDUCATION FOR ALL QUALIFIED STUDENTS, EVEN IF THEY ARE EXPELLED FROM THEIR REGULAR SCHOOL SETTING, SHOULD BE APPLIED RETROACTIVELY TO JOHN DOE AS A MATTER PENDING OR APPEALABLE ON JUNE 4, 1997, WHEN THE LEGISLATION BECAME EFFECTIVE?

III. WHETHER JOHN DOE, A MAINSTREAMED STUDENT ELIGIBLE FOR SERVICES UNDER IDEA, WAS ENTITLED TO APPROPRIATE IDEA §615 (CHANGE OF PLACEMENT) PROCEDURES—INCLUDING, inter alia, A STAY OF PLACEMENT PENDING DUE PROCESS, NO UNILATERAL REMOVAL BY THE SCHOOL DISTRICT, AND AN APPROPRIATE CURRENT RE-EVALUATION—PRIOR TO EXPULSION AND TERMINATION OF ALL EDUCATIONAL SERVICES BY HIS PUBLIC SCHOOL IN 1994?

PARTIES

Petitioners:

JOHN DOE, by and through his parents and next friends JOE and JANE DOE, and the Class of all others similarly situated

Respondents:

BOARD OF EDUCATION OF OAK PARK RIVER FOREST HIGH SCHOOL DISTRICT 200,
NANCY SMILEY,
DONALD OFFERMANN,
WILLIAM R. CRAGG,
DAVID W. RISTAU,
STEPHEN C. BRUNER,
JOHN R. McCULLOH,
REGINA KWAN PETERSON,
CHESTER L. STEWART III,
ALBERT G. SYE,
STEPHEN E. LEBRECHT,
SUZANNE J. CASEY,
DEBORAH BLUMINBERG,
both in their official capacities and as individuals.

There are no parent companies or non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners John, Joe and Jane Doe, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 115 F.3d 1273. (App. 1-21.) The Seventh Circuit Addendum dated June 23, 1997 is not reported. (App. 22-23.) The unpublished District Court opinions from the Northern District of Illinois are dated July 11, 1996 (App. 24-29), April 22, 1996 (App. 30-34) and February 16, 1996. (App. 35-50). The unpublished Level II State administrative hearing officer decision is dated July 25, 1995. (App. 51-62.) The unpublished Level I State administrative hearing officer decision is dated December 12, 1994. (App. 63-73.)

JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of Illinois obtained federal subject matter jurisdiction over the original complaint pursuant to 28 U.S.C. Sec. 1331 and 1343. This appeal arises out of an action brought by Plaintiffs-Petitioners under the Individuals with Disabilities Education Act ("IDEA"), 20 USC §1400 et seq., and the counterclaim under IDEA by Defendants-Respondents, Board of Education for Oak Park River Forest High School District No. 200, et al.

The United States Court of Appeals for the Seventh Circuit obtained appellate jurisdiction pursuant to 28 U.S.C. Sec. 1291, judgment dated July 10, 1996 having been entered on July 11, 1996 pursuant to Rule 58 of the

Federal Rules of Appellate Procedure. Plaintiffs-Petitioners filed a timely notice of appeal to the Seventh Circuit on August 7, 1996. The Seventh Circuit issued its opinion on May 27, 1997. Petitioners filed a timely Petition for Rehearing, with Suggestion for Rehearing *en banc*, on June 10, 1997 and on June 23, 1997, the Seventh Circuit panel denied that petition with a one page addendum to its opinion. This Petition for Certiorari is timely filed by mail on September 22, 1997.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

(See Appendix at App. 84)

STATEMENT OF FACTS

This is a Petition for Writ of Certiorari to review a Seventh Circuit Appellate decision (App. 1) and addendum on rehearing (App. 22) affirming a district court opinion (App. 24) which reversed, on summary judgment, a state Level II administrative hearing officer decision (App. 51) in an Individuals with Disabilities Education Act ("IDEA") Due Process proceeding.

Petitioners seek reimbursement and other relief, as awarded by the state's Level II hearing officer, for a student entitled to services under IDEA who was expelled from his public school placement without the provision of alternative services. *See* App. 103. Petitioners also contend that the expulsion was procedurally flawed pursuant to IDEA and should thus be expunged, and reimbursement for alternative services should be granted. *See* App. 1-3. Although the District Court found that only minimal procedures were implemented here, it held that, because John Doe was a mainstreamed student, he must, therefore, have

only a minor disability, and thus no more procedure was necessary. App. 44, 49-50.

Petitioners ask this Court to accept certiorari and to find that for students otherwise qualified for services pursuant to IDEA there are not now and, at least since 1994, have not been, any exceptions in IDEA permitting termination of services or minimal procedure for any reason, or more specifically based upon misconduct or the restrictiveness of the educational setting.

The facts relevant to Petitioners' Petition, as set out in the prior decisions here, are described in more detail below.

A. *Educational History*

John Doe ("John") is a student at Oak Park River Forest High School District 200 ("OPRF") and was and continues to be eligible for special education services pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 USC §1400 et seq. John started at OPRF in September, 1994, as a 13 year old freshman, and was expelled approximately two weeks later. Although Parents filed a timely due process request pursuant to IDEA, all educational services were immediately, unilaterally terminated by the school district. *See* App. 1-2.

Before John began high school at OPRF, in February, 1994, a Multidisciplinary Conference ("MDC") was held at his junior high school to consider his graduation and to prepare the Individualized Education Program ("IEP") for his change of placement to Oak Park River Forest High School.[1] *See* App. 53-54. At this MDC, OPRF's school psy-

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[1] An MDC is a meeting wherein all of a student's evaluators and service providers confer to assess, discuss and determine that

(continued...)

chologist noted the need for a reevaluation and recommended to Parents, based upon historical records she found in the school records, that John be evaluated for attention deficit/hyperactivity disorder ("ADHD"). App. 54. No such evaluations were completed before John was expelled from OPRF some seven months later. Id.[2]

B. *Expulsion*

Just into John's first semester of high school at OPRF, on September 9, 1994, John was accused of being in possession of a small quantity of marijuana at a school dance. App. 54. John was immediately suspended for ten school days and recommended for expulsion. Id.

Parents were thereafter "invited" on September 13, 1994 to attend a conference on September 16 to "review your

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[1] (...continued)
student's educational needs, services, and placement. See 23 Ill. Admin. Code § 226.550. An IEP meeting is a meeting attended primarily by a student's service providers to design an individual program with student based goals and objectives calculated to meet the needs identified by the MDC team. See 34 CFR §§300.342-300.345; 23 Ill. Admin. Code §226.562.

[2] Private testing later provided by parents and adopted by the school district revealed that John was in fact significantly disabled. Thus, at the state administrative hearings in this matter, Parents' experts testified that John's reading, written expression and math abilities were several years below grade level though his I.Q. was average. The evaluators recommended that John receive intense remedial academic and social support if he was ever to achieve near grade level. App. 56-57. Parents' experts further testified that John suffered from ADHD, low self-esteem, poor impulse control, inattention, hyperactivity and poor judgment. *See* App. 57. Parents presented evidence below to demonstrate that by this time, John's I.Q. was 30 points below his original evaluation, also provided by Parents, in 1988. *See* District Court docket No. 89, Fact 2. The school district presented no contrary evidence. *See* App. 57.

child's eligibility and needs for special education and related services (MDC), review your child's Individualized Education Program (IEP) progress and determine future IEP and educational placement needs". App. 54.

On the afternoon of September 19, 1994, that MDC/IEP convened. App. 54. Contrary to the invitation to review eligibility and needs, the team in fact met to determine whether John's alleged behavior was related to his disability. App. 54-55. No one on the MDC team except the school psychologist had ever met with or spoken with John or reviewed his school record prior to that MDC. None of John's current or former teachers or service providers were in attendance. App.54.

At this MDC/IEP, the OPRF school psychologist again noted the need for a reevaluation and an ADHD evaluation. OPRF refused Parents' request to evaluate John for ADHD or to allow them an opportunity to seek a private evaluation prior to determining whether John's behavior was related to his disability. The team was told by the school district that it must base its decision only on the information before it, even though it was almost three years old.

There being no current evaluative data to consider, the team based its decision on whether John's behavior was related to his IEP goals and objectives rather than whether it was related to his disability. *See* App. 54-55. The school psychologist and other team members noted that the determination that John had ADHD would have likely impacted their decision as to whether his misbehavior was related to his disability. App. 55. In fact, each team member expressed discomfort with making this decision based only upon the outdated information available. Id. The team also found that John's current placement was inappropriate and insufficient to meet his needs. App. 55-56. Nonetheless, the team concluded that John's misbehavior was not related

to his admittedly inappropriate IEP, so that the school district could proceed with its expulsion recommendation. App. 55.

Parents immediately filed a request for a due process hearing. App. 56. The school district proceeded to immediately expel John and refused to stay John's placement or offer alternative services to John during the period of his expulsion. Id.

C. *IDEA Administrative Procedures*

1. *Level I*

In November, 1994 a Level I due process hearing was held. At the hearing Dr. John Meade, a state certified psychologist, testified that he had conducted an evaluation at the request of John 's pediatrician. Dr. Meade testified as an expert for parents that he had evaluated John. In his opinion John suffered from ADHD and John 's behavior in bringing the marijuana to school was related to and resulted from his disabilities, ADHD and low self-esteem. App. 56. A copy of his evaluation was entered of record.

Ms. Kathy Foulks, principal for John 's private special education placement paid for by parents upon his expulsion, also testified as an expert on Parent's behalf. She testified that John's misbehavior was clearly related to his disability. App. 56.

Neither expert's opinion was ever contradicted by the school district. The school district offered no evidence on the issue of relatedness. In fact, the school district psychologist agreed that John's history suggested ADD or ADHD and that such a diagnosis would impact her opinion as to whether his alleged behavior was related to his disability. App. 57.

Parents' due process request raised seventeen different issues related to violations of John's and Parents' rights by the school district. App. 57. The Level I hearing officer did not rule on any of these issues, but instead held generally that OPRF's expulsion and the immediate total cessation of services to John were proper and did not violate John's or Parents' rights. *See* App. 71.

2. *Post-Level I*

Following the Level I hearing, the district did not convene an MDC to consider the results and recommendations of Dr. Meade's independent evaluation tendered at the Level I hearing. Instead, on January 25, 1995, Parents requested such an MDC. The school district convened that MDC on February 27, 1995. However, the school district psychologist admitted that prior to the MDC she had never even seen Dr. Meade's report. App. 57. Dr. Meade's report had been available to the school district since at least the November, 1994 Level I due process hearing. App. 56.

Although the spring semester at OPRF had begun in January, 1995, prior to the MDC, the school made no contact with parents to convene an IEP for Spring 1995 or to transition John back into OPRF. Parents were not even advised when the second semester started. In fact at the MDC parents were told they must re-enroll John into OPRF. App. 58.

The February 27, 1995 MDC states (at p.5) "John has a learning disability per Psycho.Ed. and acceptance of this report by Dr. DeRose-Ihrig." The Psychoeducational Report referred to was that prepared by Kathy Foulks and John's MDC team at his private placement. Although this in-depth Psychoeducational evaluation finds that John is ADHD and the MDC specifies the rendering of certain services related to ADHD, OPRF continues to refuse to acknowledge this diagnosis. App. 58.

3. *Level II*

Parents' timely filed a request for Level II review of the Level I administrative hearing decision. That request contended that the Level I decision was legally and factually erroneous in its entirety. App. 57.

At the Level II hearing, held on March 13, 1995 and April 10, 1995, additional testimony and documents were produced by both sides. App. 52. Ms. Kathy Foulks testified that she headed an MDC team at John's private placement to consider Dr. Meade's evaluation as well as an evaluation performed by the Acacia MDC team. That MDC team concluded that John was dyslexic, significantly behind in achievement, had significantly impaired auditory processing, and was ADHD, and that his needs included further OT/PT evaluations, direct psychological services, social work services and an inclusion facilitator. The school district had previously adopted this evaluation at John's February 27, 1995 MDC. Ms. Foulks also testified that John's expulsion had been educationally disastrous for him. *See* App. 59.

The Level II hearing officer found in Parents' favor on all issues, reversing the Level I decision and ordering:

1. The district to expunge all records of the expulsion from [John's] permanent record;
2. The district is to reimburse Parents for the cost of [John's] alternative education for this school year;
3. The district is to reimburse Parents for the cost of [John's] independent evaluations;
4. The district is to outline a progressive discipline policy in John's IEP to address behaviors related to [John's] disability as identified by Parent's experts;
5. The district is to complete and staff for all evaluations called for [John's] February 27, 1995 MDC prior to September, 1995;

> 6. Finally, I order that given the school district's refusal to stay or provide any alternative educational placement for [John], his placement has been appropriately stayed at Acacia Academy during the pendency of this review and the cost of that placement shall be borne by the school district.

Level II decision, App. 60-61.

OPRF appealed the Level II decision by counterclaim in this matter on October 11, 1995, and the parties filed cross-motions for summary judgment on the counterclaim and on Count VIII of Petitioners' complaint. App. 2. The U.S. District Court on summary judgment, without further evidence, or the Administrative Record,[3] reversed the Administrative Hearing Officer's decision, and also granted summary judgment against Petitioners on their due process claims.[4] Petitioners timely appealed and the Seventh Circuit affirmed the District Court decision on May 27, 1997 (App. 1) and denied Petitioners' Petition for Rehearing on June 23, 1997. App. 22.

ARGUMENT

Introduction

Petitioners first show why this Court should grant certiorari on this case. Petitioners then set out their arguments that the Seventh Circuit misinterpreted IDEA

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[3] Petitioner also filed a Motion to Vacate based on the absence of the Administrative Record pursuant to 20 USC §1415(e)(2), which was denied by the Seventh Circuit.

[4] By memorandum opinion of July 10, 1996 (App. 24), the District Court reconsidered its memorandum opinion of April 19,1996 (App. 30), which was a reconsideration of its February 15, 1996 memorandum opinion (App. 35). Judgment was granted on the July 10, 1996 Opinion.

in finding that it did not require the continuation of educational services, even in an alternative setting, to special education students expelled for reasons unrelated to their disability. Alternatively, Petitioners next argue that, if IDEA did not previously require appropriate educational services to all qualified students with a disability, including those expelled, then the 1997 Amendments to IDEA should have been applied retroactively in that the relevant amendments became effective while this case was still pending or appealable.

Finally, Petitioners assert that the procedures pursuant to which John Doe was expelled were so flawed that the requested relief should be granted.

I. CERTIORARI IS APPROPRIATE

Review of this Seventh Circuit opinion is of utmost importance since it clearly conflicts with this Court's broad interpretations of IDEA, the holdings of other circuits, and Congress' own interpretation of its law. *Honig v. Doe*, 484 U.S. 395, 108 S.Ct. 592 (1988); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993); *S-1 v. Turlington*, 635 F.2d 342, 348 (5th Cir.), *cert. den.*, 454 U.S. 1030, 102 S.Ct. 566 (1981); *Kaelin v. Grubbs*, 682 F.2d 595, 600 (6th Cir. 1982); Senate Committee Report, 1997 IDEA Reauthorization (App. 75); House Report 105-95 (App. 79).

Despite Congress' explicit 1997 "clarification" of IDEA to require the provision of a free appropriate public education ("F.A.P.E.") to otherwise eligible students suspended or expelled, the Seventh Circuit upheld John Doe's 1994 expulsion and unilateral termination of services. The District Court opinion here for the first time gave other school districts license to unilaterally exclude special education students. Thus, following the original District Court opinion in this matter, holding for the first time in any jurisdiction

that educational services to expelled special education children could be terminated, there were up to 2,100 expulsions of special education students involving termination of services (as opposed to 800 the year before) reported by school districts in the state of Illinois. *See* App. 80.[5] Recently, the Seventh Circuit opinion was also used to uphold an expulsion involving termination of services prior to June 4, 1997 in the matter of *OPRF v. Illinois State Board of Education*, Docket No. 94 C 6105 (N.D. Ill.) (appeal pending). Accordingly, John Doe is far from the only child significantly impacted by this decision.[6] Unless this Court overrules the Seventh Circuit, these children will be left without a remedy and, for those whose parents could not afford a

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[5] Although the State of Illinois does not currently maintain statistics as to the numbers of special education students expelled each year, it does maintain statistics as to how many special education students exit special education programming for various reasons each year. The State identifies fourteen specific categories, such as graduated with diploma, moved from district, removed from public school and privately placed and returned to regular education program full time. *See* App. 80 and exhibit thereto. There is also an "other" category, which includes expulsions. The "other" category rose from 800 in the 1995-96 school year, just prior to the District Court opinion in the case at bar, to 2,159 in 1996-1997, following the District Court opinion. App. 80.

[6] Although counsel indicated during oral argument that John was solely requesting reimbursement for the unilateral placement, she thereafter learned that due to financial hardship, Parents were never able to fully pay for the private placement. Therefore, unless the school district pays for the placement, John's academic credits will not be transferred to OPRF, and he will be forced to repeat that year of credits which will be a particular hardship on John since he is already repeating his junior year because he failed all his subjects.

private placement for their special needs children, without an education.[7]

Petitioners believe that providing an avenue of relief to any children who have already been inappropriately denied an education, alone, warrants this Court's attention. But there is another concern here, too: Congress has clarified the rights of special education students to continued services this time, but what about the next exception carved out by the courts below? How many children will lose their right to an education awaiting a clarification next time? If this Court declines to hear this matter, Petitioners fear that school boards will be more likely to opt against services the next time a question arises which is not specifically addressed on the face of IDEA. School boards may simply wait until someone challenges them on the issue, and then take their chances with the courts.

This Court has defended IDEA's broad remedial nature in the past, but still courts below find exceptions. This Court should take this opportunity to confirm that, given the broad remedial nature of IDEA, there will be *no* exceptions read into IDEA: students with disabilities who otherwise qualify for services under IDEA will not waive those services, or the procedures to which they are entitled, for *any* reason. This, of course, includes discipline related

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[7] Moreover, despite the recent clarification of IDEA, the Seventh Circuit opinion here continues to affect the lives of hundreds or even thousands of children in Illinois alone who are otherwise eligible for services through age 21. At a time when there exists a national crisis on education, this decision, which is contrary to Congress' intent, should not be left unchallenged. It is a decision which supports the termination of educational services to the neediest of our children, and is the death knoll of education for any nineteen year-old disabled child expelled prior to June 4, 1997, since the Illinois School Code provides that students may be expelled for up to two years for gross disobedience or misconduct. 105 ILCS 5/10-22.6(d) (1996).

reasons and restrictiveness of the educational setting, upon which the Seventh Circuit opinion here rests.

II. PURSUANT TO THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT ("IDEA"), 20 U.S.C. §1400 et seq., JOHN DOE, A QUALIFIED STUDENT WITH A DISABILITY, WAS ENTITLED TO CONTINUED ALTERNATIVE EDUCATIONAL SERVICES AT PUBLIC EXPENSE WHEN HE WAS EXPELLED FROM HIS PUBLIC SCHOOL PLACEMENT IN SEPTEMBER, 1994.

While this matter was pending in the Seventh Circuit, on May 13, 1997, the United States House of Representatives (by a 420-3 vote) and on May 14, 1997, the United States Senate (by a 98-1 vote) passed the following "clarification" to IDEA, Section 612(a)(1)(A):[8]

> "(A) IN GENERAL - A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school."

This clarification of the law settles once and for all Congress' intent that all disabled children are entitled to educational services including those who engage in misconduct. Nonetheless, the Seventh Circuit Panel affirmed the District Court opinion to the contrary on May 27, 1997. Thereafter, on June 4, 1997, IDEA's reauthorization which contained this clarification of the expulsion issue, support-

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[8] On this point, both the House of Representatives Committee Report and the Senate Committee Report are in precise accord:

> "Section 612 contains clarifications of current law. To receive part B funds, States are to make available a free appropriate public education to all children with disabilities, including children with disabilities who have been suspended or expelled from school." House Report 105-95, Explanation, §612 (App. 79); Senate Committee Report §612 (App. 75).

ing Petitioner's position in this matter, was signed and immediately became effective. IDEA Amendments of 1997, Title II, §201(a)(1). Despite Congress' clarification, on June 23, 1997, the Seventh Circuit denied Petitioners' Petition for Rehearing.

It is evident from the legislative history, cases interpreting IDEA, OSEP recommendations and Congress' own continuing interpretation that the Seventh Circuit is wrong in concluding that as originally enacted, expulsion without services was permissible under IDEA. This reading of IDEA flies in the face of the broad interpretation this Court and others have previously found. *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592 (1988); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993); *S-1 v. Turlington*, 635 F.2d 342, 348 (5th Cir.), *cert. den.*, 454 U.S. 1030, 102 S.Ct. 566 (1981); *Kaelin v. Grubbs*, 682 F.2d 595, 600 (6th Cir. 1982). The Seventh Circuit opinion here essentially holds that, unless particular services are specifically provided in IDEA, they are not available.

Prior to enacting the EHA (now IDEA). Congress compiled statistics which estimated that of eight million disabled children in the United States, 1.75 million were excluded from public schools and 2.5 million were receiving an inappropriate education. S. Rep. No. 168, 94th Cong., 1st Sess. 2 (1975), reprinted in 1975 U.S.C.C.A.N. at 1432. Legislators were particularly mindful that children with emotional or behavioral difficulties were routinely excluded from the classroom for disruptive behavior. The legislators thus intended the IDEA to have a broad remedial effect to end such exclusions. Id. at 1433.

Congress explicitly relied on two district court cases to guide them in drafting the IDEA: *Pennsylvania Association for Retarded Children v. Pennsylvania*, 343 F.Supp. 279 (E.D. Pa. 1972) and *Mills v. District of Columbia Bd. of*

Educ., 348 F.Supp. 866 (D.C. Cir. 1972). S.Rep. No. 168 at 6, U.S.S.C.A.N. at 1430. These cases both "involved the exclusion of hard-to-handle disabled students." *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592 (1988); see also S. Rep. No. 168, 94th Cong., 1st. Sess. 6 (1975), reprinted in U.S.C.C.A.N. at 1430. Accordingly, Congress was specifically concerned with this issue and the EHA was enacted in part to prevent such unilateral exclusions.

This Court has long acknowledged the importance of these two cases on the issue of termination of services for misbehaving students. "The fact that both *PARC* and *Mills* are discussed at length in the legislative Reports suggests that the principles which they established are the principles which, to a significant extent, guided the drafters of the Act." . . . *Board of Education of Henrick Hudson Central School District v. Rowley*, 458 U.S. 176, 194, 102 S.Ct. 3034, 3044 (1982). This Court in *Rowley* found that the "major principles" of these "right to education" cases where incorporated into the IDEA. *Id. Mills*, in particular, stands for the proposition that no child with a disability is too retarded, too disturbed, or too much of a behavior problem, to be excluded from or denied a public education. *Mills*, 348 F.Supp. at 875.

There was nothing in the prior statute or its legislative history to suggest that, prior to the 1997 reauthorization, an exception existed based on the disciplinary policies of individual school districts. Indeed, the title of the Act sets the tone "The Education for *All* Handicapped Children Act." 20 U.S.C. § 1400 et seq. (emphasis added). IDEA's liberal use of the word "all" is clear, unequivocal and should not be ignored.[9]

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[9] Some examples: The IDEA requires that for a state to qualify for financial assistance, it must have "in effect a policy that

(continued...)

Indeed this Court thought it clear:

> "Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disabled students, from school. In doing so, Congress did not leave school administrators powerless to deal with dangerous students; it did however, deny school officials their former right to 'self-help' and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts."

Honig, 484 U.S. at 323-24, 108 S.Ct. at 604. Accordingly, this Court declined the invitation to "rewrite the statute" to read a "dangerousness" exception into the IDEA. Id. at 323, 108 S.Ct. at 604.

Until recently, *Honig* and its progeny consistently held that the IDEA applied to all handicapped students including those suspended or expelled long term or attending private schools. *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993); *S-1 v. Turlington*, 635 F.2d 342,

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[9] (...continued)
assures *all* handicapped children the right to a free appropriate education." 20 U.S.C. § 1412(1) (emphasis added). The state must "set forth in detail the policies and procedures which the State will undertake . . . to assure that—there is established a goal of providing full educational opportunity to *all* handicapped children . . ., [and that] a free appropriate public education will be available for *all* handicapped children between the ages of three and eighteen . . . not later than September 1, 1978, and for *all* handicapped children between the ages of three and twenty-one not later than September 1, 1980. . . ." 20 U.S.C. § 1412(2)(A) and (B) (emphasis added). The state must also assure that "*all* children residing in the State who are handicapped regardless of the severity of their hardship, and who are in need of special education and related services are identified, located and evaluated. . . ." 20 U.S.C. §1412(2)(C) (emphasis added). See also 20 U.S.C. § 1414 (a)(1)(A).

348 (5th Cir.), *cert. den.*, 454 U.S. 1030, 102 S.Ct. 566 (1981); *Kaelin v. Grubbs*, 682 F.2d 595, 600 (6th Cir. 1982); *Bd. of Education of the City of Peoria v. Illinois State Board of Education*, 531 F.Supp. 148, 151 (N.D. Ill. 1982); *Magyar v. Tuscon Unified School District*, 25 IDELR 608, 615 (U.S. Dist. Ct., Az, 1997). The stated purpose of IDEA is "to assure that *all* children with disabilities have available to them . . . a free appropriate public education." 20 USC 1400 (c) (emphasis added). However, in Spring, 1997, the Fourth Circuit *en banc*, reversing the panel decision held that the IDEA only required that states offer the opportunity for a free appropriate public education (F.A.P.E.), which students could forfeit through misbehavior. *Virginia v. Riley*, 106 F.3d 559 (4th Cir. *en banc*, 1997).

Congress' reaction was swift and on May 14, 1997, it reauthorized the IDEA with the "clarification" at issue here. During debate on the Bill in the House, Congressman Martinez (House Committee member, co-sponsor) specifically stated:

> "Despite part B, the heart of the act which mandates that children with disabilities receive a free appropriate public education, being permanently authorized, modifications were necessary to strengthen the acts protections, safeguards and enforcement means. In addition, interpretations by the courts of various aspects of part B has necessitated that Congress clarify its intent.
>
> Among the modifications made by H.R. 5 to the act is a provision which specifically states that educational services for children with disabilities who are suspended or expelled cannot be ceased. Since the inception of the act, the Department of Education has interpreted current law to allow schools to use disciplinary proceedings on children with disabilities, including expulsion. However, the Department's interpretation of the law is that these procedures cannot result in a cessation of educational services. Unfortunately, this interpretation

of the statute was called into question by a recent case before the Fourth Circuit Court of Appeals—Virginia Department of Education versus Riley. In the Virginia case the court held that the department's interpretation of the statute was incorrect and that services could be ceased to children with disabilities in certain circumstances.

In order to clarify Congressional intent, the bill codifies the long held interpretation of the department with language that would require a free appropriate public education for all children with disabilities, including those who are suspended or expelled. This will end the short-sighted practice of leaving children with disabilities without the educational tools they need to become active and successful members of society." Individuals with Disabilities Education Act Amendments of 1997 (page: E972) Hon. Matthew G. Martinez in the House of Representatives, Tuesday, May 13, 1997.

Prior to the reauthorization, Congress repeatedly refused to make any exception for misbehavior. For example, while there were no dissenting views related to the "clarification" issue, the single additional view (contained in the House of Representatives Committee Report), written by Major R. Owens (D. N.Y., Member of the House Committee on Education and Labor) specifically noted:

"During consideration of the IDEA in the 104th Congress, emphasis was shifted away from improving the educational opportunities for these needy children. Instead, Majority Members of the Committee on Economic and Educational Opportunities sought to create a discipline model that would actually deny certain children their civil right to an education. This attempt was correctly attacked by nearly every education group in the country. Their opposition to this provision stopped the reauthorization of the IDEA in its tracks."

Committee Report, House Rpt. 105-95, Additional Views.[10]

Similarly, Mr. Harkin (co-sponsor) noted during a debate to amend the Act as written to provide for termination of services during expulsions, "I rise in strong opposition to the amendment proposed by my colleague Senator Gorton . . . Under the amendment, local school districts could cease educational services for any disabled child regardless of

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[10] Congress even refused to terminate services for students with weapons. Thus, in passing the Improving America's Schools Act of 1994, Pub. L. 103-382, 108 Stat.3518 (enacted October 20, 1994), Congress specifically amended the stay-put provision of IDEA to provide for the temporary removal to an alternative placement of special education students who bring weapons to school. 20 USC §1415(e)(3)(B)(i). Specifically, §1415(e)(3) of IDEA, as amended by the Improving America's Schools Act, provides:

> (3)(A) Except as provided in subparagraph (B), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.
>
> (B)(i) Except as provided in clause (iii), if the proceedings conducted pursuant to this section involve a child with a disability who is determined to have brought a weapon to school under the jurisdiction of such agency, then the child may be placed in an interim alternative educational setting, in accordance with State law, for not more than 45 days.

The Seventh Circuit in this matter apparently looked at only subsection (B) of this statute, reading it to mean only that a school district "may" (or, apparently, may not) continue to provide educational services. App. 11, fn. 4. Petitioners submit that, instead, subsection (B) is an exception to subsection (A), pursuant to which a school district may temporarily remove a special education student bringing a firearm to an alternative setting, so long as services are continued. The discretion is only *where* to provide services, not *whether* to provide them at all.

whether or not the child's behavior was related to his or her disability. Cessation of services is not only opposed by all disability organizations, but is opposed by the major groups representing general education and the police and prosecutors. That is why the bipartisan bill rejects cessation." IDEA 1997 Amendments, Senate, May 13, 1997, p. S4364.

In denying Petitioners' Motion for Rehearing, the court below (at App. 23) misapplied this Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994), to hold that the reauthorized IDEA was not retroactive. However, this is not a case where Congress "changed" the law as in *Landgraf*. Instead, Congress merely clarified what the law already required. The Seventh Circuit's reliance on *Landgraf* is accordingly misplaced. Rather than looking at the face of the 1997 reauthorization to determine retroactivity, the Seventh Circuit should have deferred to Congress expressed interpretation of its own law, as well as to OSEP's interpretation.

III. ALTERNATIVELY, THE 1997 AMENDMENTS TO IDEA, WHICH CLARIFY THE RIGHT TO A CONTINUED EDUCATION FOR ALL QUALIFIED STUDENTS, EVEN IF THEY ARE EXPELLED FROM THEIR REGULAR SCHOOL SETTING, SHOULD BE APPLIED RETROACTIVELY TO JOHN DOE AS A MATTER PENDING OR APPEALABLE ON JUNE 4, 1997, WHEN THE LEGISLATION BECAME EFFECTIVE.

As set out above, Petitioners assert that the Court does not even have to reach the issue of retroactivity. Instead, this Court should read the 1997 reauthorization and the Congressional Reports regarding same in interpreting the statute as of 1994. According to Congress, the Department of Education and other Circuits, IDEA has always provided for the continuation of services upon expulsion, without

regard to whether the misconduct was related to the disability.

Alternatively, if this Court finds it necessary to evaluate whether the application of the clarification should be retroactive, Petitioners believe that the Seventh Circuit (at App. 23) misreads and misapplies *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994). *Landgraf* does not stand for the proposition that a statute will not be applied retroactively unless there is a retroactivity clause in the legislation. Instead, this Court in *Landgraf* specifically looked beyond the face of the statute to determine whether the legislative history reveals evidence that Members believed an agreement had been tacitly struck regarding retroactivity. 114 S.Ct. at 1495-96. In *Landgraf* there was no such agreement. In contrast, in the case at bar, the Members of both houses specifically stated in their committee reports that the amendments as to continuing services during an expulsion were not a change in the law at all, but were only a clarification of what the law had always been.

The Seventh Circuit also misapplies *Landgraf* and the facts here, when the court refuses to apply the 1997 Reauthorization here because such application "would have a truly retroactive effect—it would increase a party's liability for past conduct." App. 23. First, Congressional intent is clear here and, "where the congressional intent is clear, it governs." *Landgraf*, 114 S.Ct. 1496 (cites omitted).

Moreover, there is no "additional or unforeseeable obligation" imposed here. *Landgraf*, 114 S.Ct at 1503 (cite omitted). Prior to the District Court opinions in this matter, OSEP had advised school districts since 1989 that they must continue to provide educational services to expelled students qualified for services pursuant to IDEA and directed that the schools may, utilizing the appropriate

IDEA procedures for a change in placement, prepare a new IEP for the student at an alternative setting to be provided at public expense. *See, e.g.*, New Inquiry 213 Educ. Handicapped L. Rep. (CRR) 258 (OSERS Sept. 15, 1989); 20 IDELR 625, 626 (1993); 20 IDELR 542, 544 (1993); 20 IDELR 1255, 1256 (1993).[11]

Given the facts of this case, a more appropriate analysis is found in *Bradley v. School Board of Richmond, et al.*, 416 U.S. 696, 94 S.Ct. 2006 (1974). This Court held in *Bradley* that a Court must apply the law in effect at the time it renders its decision unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. 416 U.S. at 711. This court found that rule particularly appropriate where, as in this case, the party against whom the rule is to be applied retroactively is a publicly funded governmental entity, a school board, while the party seeking protection of the current law is a child or children pursuing their civil rights to an education. 416 U.S. at 718. In *Bradley*, the Court specifically found that:

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[11] The Seventh Circuit had also reviewed OSEP's authority to issue that very ruling and specifically found the OSEP directive "merely explained what the statute already requires." *Metropolitan Dist. of Wayne Township v. Davila*, 969 F.2d 485, 493 (7th Cir. 1992). Thus, although courts may not be bound by OSEP's interpretation, "parties regulated by the statute certainly are." Id. Other circuit courts had also found in favor of alternative services. *S-1 v. Turlington*, 635 F.2d 342, 348 (5th Cir.), *cert. den.*, 454 U.S. 1030, 102 S.Ct. 566 (1981); *Kaelin v. Grubbs*, 682 F.2d 595, 600 (6th Cir. 1982). Similarly, this Court had previously acknowledged IDEA's broad remedial nature. *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592 (1988); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1983). Thus school districts were certainly on notice that continued services upon expulsion might be required by law.

1. The publicly elected School Board did not have a matured or unconditional right which would be affected by retrospective application of an attorney fee provision, as the Board's funds were essentially held in trust for the public, "and at all times the Board was subject to such conditions or instructions on the use of the funds as the public wished to make through its duly elected representatives." 416 U.S. at 720.

2. Retrospective application did not impose an additional or unforeseeable obligation on the Board because, from the outset, there were different theories, albeit uncertain, under which the same outcome might have been reached. 416 U.S. at 721.

3. Based upon a review of the statutory history, that the statute in question had to do with a "great national concern" and should therefore presumably be applied retroactively. 416 U.S. at 719.

Applying these standards in this case:

1. As in the *Bradley* case, the parties here are children seeking to obtain an appropriate education from a publicly funded school board. Congress has recognized a disabled child's right to an appropriate education to be an important civil right, thus, the public, through its duly elected representatives, has told the Board of Education here what to do with the public funds it holds in trust: provide an appropriate education to all disabled students, including those suspended or expelled.

2. The Board cannot claim that this is an unforeseen or additional obligation, given the Department of Education's Guidelines and the case law which preceded the Fourth Circuit opinion as cited infra.

3. There is ample evidence in the legislative history here, as quoted infra, that Congress very much meant the 1997 Amendments to Section 612 as a clarification only, not

to change the law already in effect: all students with disabilities are entitled to a free appropriate public education, even if they misbehave for reasons unrelated to their disabilities. There is also ample evidence that Congress specifically considered and rejected all attempts to amend IDEA to allow for exclusion due to misbehavior. Thus, this Court must agree that, unlike the provision in *Landgraf*, Congress' intent to apply the law retroactively is clear.

Accordingly, if this Court finds that IDEA did not previously provide for the continuing education of all students otherwise qualified for services, even those students expelled for reasons purportedly unrelated to their disability, the 1997 IDEA Reauthorization should be applied retroactively to grant Petitioners' requested relief.

IV. JOHN DOE, A MAINSTREAMED STUDENT ELIGIBLE FOR SERVICES UNDER IDEA, WAS ENTITLED TO APPROPRIATE IDEA §615 (CHANGE OF PLACEMENT) PROCEDURES—INCLUDING, inter alia, A STAY OF PLACEMENT PENDING DUE PROCESS, NO UNILATERAL REMOVAL BY THE SCHOOL DISTRICT, AND AN APPROPRIATE CURRENT RE-EVALUATION—PRIOR TO EXPULSION AND TERMINATION OF ALL EDUCATIONAL SERVICES BY HIS PUBLIC SCHOOL IN 1994

In addition to misinterpreting IDEA on the issue of termination of services, the District Court found and the Seventh Circuit affirmed, "minimalist tendencies where due process is concerned" is all that is required where, as here, the student is a mainstreamed special education student. App. 49-50. In less restrictive settings, the court notes, "it is more often the case that a relatively minor disability is present." App. 44. Thus, under this holding, parents of disabled children are forced to choose between their IDEA rights to educate their children in the least restrictive environment and their IDEA due process rights. Such a choice is nowhere envisioned in IDEA.

Here, John's parents requested a due process hearing as soon as they were notified that OPRF proposed a significant change (ie, expulsion) in John's placement. But after John's parents requested a due process hearing, OPRF both advised parents of his expulsion and implemented the expulsion. Moreover, OPRF testified that it is school district policy to refuse to stay special education placements pending due process when the proposed change in placement is an expulsion. OPRF's refusal to stay the placement of John and similar special education students is clearly contrary to IDEA, the Supreme Court decision in *Honig* and the Department of Education's long-standing interpretation of IDEA. *See* OSEP opinion letter, 22 IDELR 370, 371 (1994).

The court also erroneously failed to affirm the administrative hearing officer's finding that the school district violated the law when it failed to properly re-evaluate a student with a disability prior to expelling him, pursuant to 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 USC § 794, and its implementing regulations. Those regulations specifically require:

> (a) Pre-placement evaluation
>
> A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program *and any subsequent significant change in placement.*

34 C.F.R. 104.35 (emphasis added).[12]

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[12] Similarly, IDEA's implementing regulations provide that a re-evaluation of a special education child be conducted at least every

(continued...)

The Supreme Court has held that an expulsion constitutes a significant change in placement. *Honig v. Doe*, 484 U.S. 305. Such a significant change in placement is also certainly "a condition" warranting a re-evaluation. John's proposed expulsion, then, should have triggered an evaluation pursuant to both Section 504 and IDEA. Moreover, John's parents, at the September 19, 1994 MDC, specifically requested further evaluations prior to a change in John's placement and the school psychologist had previously recommended such evaluations. In accordance with state law, those evaluations should have been completed by the school district prior to John beginning high school. See 34 C.F.R. 300.344, 23 Illinois Administrative Code 226.535, 23 Illinois Administrative Code 226.540, OSEP opinion letter, 22 IDELR 370, 371(1994).

To conduct an appropriate evaluation and to interpret that evaluation in making placement decisions, a school district must, under Section 504:

> (c) Placement procedures.
>
> In interpreting evaluation data and in making placement decisions, a recipient shall (1) rely upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) en-

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[12] (...continued)
three years," or more frequently if conditions warrant, or if the child's parent or teacher requests an evaluation." 34 C.F.R. 300.534(b).

> sure that the placement decision is made in conformity with 104.34.

34 CFR 104.35 (c). See also 34 C.F.R. 300.533; 20 USC §1401.

Additionally, under IDEA the school district must ensure, at a minimum, that:

> (e) The evaluation is made by a Multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in that area of suspected disability.
>
> (f) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

34 C.F.R. 300.533.

Contrary to these requirements, in making its September 19, 1994 MDC placement decision, OPRF failed to provide current evaluative data, failed to provide an ADHD evaluation despite its own psychologist's suggestion and parents request and failed to include on the MDC team *any* persons knowledgeable about John Doe. Thus based on the record before him, as cited at length in his findings of fact (App. 53-59), the Level II hearing officer properly concluded that John was not fully, properly serviced or evaluated by the school district prior to OPRF's finding that his behavior was not related to his misconduct and that OPRF continued to fail to properly evaluate and service John after expelling him. App. 60.[13] Thus, OPRF's determination of unrelat-

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[13] It should be noted that OPRF failed to supply any authority for its position that parents' experts cannot diagnose ADHD because a medical diagnosis is necessary, despite the Hearing Officer's request. Furthermore, the United States Office for Special Education Programming ("OSEP") had previously specifically

(continued...)

edness and the resulting expulsion and discontinuation of services were improper. App. 60-61.

Furthermore, the school district, not the parent, had the burden of proof to establish that Doe's misconduct was unrelated to his disability. See *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592 (1988); *Board of Education of Murphysboro Community Unit School District No. 186 v. Illinois State Board of Education, et al.*,41 F.3d 1162 (7th Cir. 1994). Here, the School District did not put forth any evidence whatsoever on the issue of relatedness. The Panel decision thus turns this burden on its head by requiring that parents establish by an "absolutely convincing" standard that John had ADHD and that it was related to his misconduct.[14] App. 17.

The Court further concluded that although John's learning disability resulted in low self esteem causing misbehavior, the low self esteem nonetheless has only an attenuated

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[13] (...continued)
held that IDEA does not require a medical diagnosis for ADD. 21 IDELR 73, 77.

[14] Furthermore, the Court's decision loses sight of the manifest injustice done to the student in this matter. Parents presented uncontradicted evidence below that this is a child who in the second grade had a full scale Intelligence Quotient (IQ) of 128 (superior); who at the time of the misconduct, a freshman in high school (9th grade), was failing all of his subjects and whose reading ability was 4th grade, math ability was 3rd grade and handwriting speed was 1st grade. Moreover, the School District's most recent evaluation revealed that John had made no progress in the areas of his disability and his full scale IQ is now 98 (borderline average). Furthermore, although the School District continues to dispute his ADHD for purposes of this lawsuit, they acknowledge its impact on John on a daily basis in discussions with parents. Finally, John failed his junior year of school completely. John, his parents, and the school district need resolution on the question of his expulsion so that all parties can get on with the task of educating John.

relationship to his disability. This Court's decision ignores the reality that children who do not receive appropriate services often act out and are more likely suspended or expelled. This in fact formed the basis of the original EHA and was specifically considered by Congress during the debate on reauthorization in rejecting an amendment which would cease educational services to children like John, Senator Harkin noted:

> "Under IDEA, we want to use discipline as a tool to learn and not just as a punishment and to ensure that each child receives the supportive services necessary to function appropriately in a classroom environment.
>
> For example, we have some examples of kids. . . . We are told by the school that they felt Nick was emotionally disturbed, mentally retarded, and did not belong in the school. They did not know what to do. But they sought an evaluation at the clinic in LaCrosse, WI. They met with the child's specialist. He had a superior IQ of over 130. His behavior problem stemmed from tremendous frustration of an unidentified, profound learning disability. Once that was recognized, once he got the supportive services, his behavior problems literally disappeared overnight." Individuals with Disabilities Education Act Amendments of 1997 (Senate - May 13, 1997).

Petitioners therefore request that this Court also grant certiorari to overrule the Seventh Circuit opinion as to the implementation of IDEA procedures. Given the facts as found by the State Level II hearing officer, who heard testimony and received documents, Respondents did not provide appropriate procedure to John Doe prior to expelling him. John Doe, and similar special education students, are entitled to appropriate IDEA procedures without regard to the restrictiveness of their educational placement.

CONCLUSION

Thus, unless this decision is reversed, John Doe will be required to repeat another year in school and possibly hundreds of other children excluded from F.A.P.E. both before and during the pendency of the *Doe* decision will not be eligible for reimbursement for unilateral placements or compensatory educational services, which Congress clearly intended they receive.

Congress' goal of appropriately educating every handicapped child is incapable of attainment unless the Seventh Circuit decision in *Doe* is reversed. So long as school districts continue to oppose IDEA's broad requirement to service all children, there is little hope that our neediest children will receive an appropriate education. Indeed this *Doe* decision implicitly encourages school districts to defy OSEP and take far more conservative positions regarding the provision of services if the law does not specifically require the services on its face.

For the foregoing reasons, this Court should grant this writ and reverse the opinion or, at the very least, amend the decision to address the current law as clarified by the IDEA reauthorization.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-3014

JOHN DOE, by and through his parents and next friends and the class of all others similarly situated, JANE DOE, next friend and JOE DOE, next friend,

Plaintiffs and Counter-Defendants-Appellants,

v.

BOARD OF EDUCATION OF OAK PARK & RIVER FOREST HIGH SCHOOL DISTRICT 200, NANCY SMILEY, DONALD OFFERMANN, STEPHEN C. BRUNER, both in their official capacities and as individuals, et al.,

Defendants and Counter-Plaintiffs-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 C 6449—**Charles P. Kocoras**, *Judge*.

ARGUED APRIL 11, 1997—DECIDED MAY 27, 1997

Before CUMMINGS, COFFEY and EASTERBROOK, *Circuit Judges*.

CUMMINGS, *Circuit Judge*. Plaintiff John Doe ("John") was a recently enrolled, 13-year-old freshman at Oak Park River Forest High School ("OPRF"), when he was accused of being in possession of a pipe and a small amount of marijuana at a freshman dance on September

9, 1994. John was a special education student who had been identified as having a learning disability. The OPRF Board of Education (the "Board") issued a ten-day suspension in accordance with its Code of Conduct and thereafter expelled John for the remainder of the fall semester.

On September 23, 1994, the Does filed a due process hearing request under the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* (the "IDEA"), asserting that OPRF's determination that John's conduct was unrelated to his disability was inadequate. On December 12, 1994, the Level I hearing officer upheld the Board's actions, agreeing with the Board's determination that John's actions were not related to his disability. On July 25, 1995, the Level II hearing officer reversed, concluding that OPRF's failure to stay John's placement or provide alternative educational services had violated John's due process and IDEA rights in several respects.

On October 26, 1994, the Does filed an eight-count complaint in the district court in the Northern District of Illinois, alleging that John's expulsion violated his Fourteenth Amendment due process rights as well as other constitutional and statutory rights. Count 8 of the Does' complaint alleged violations of the IDEA. OPRF's motion for summary judgment on all of the Does' complaint except Count 8 was granted on October 11, 1995, following the district court's determination that the procedures OPRF followed in making its decision to expel John afforded him adequate due process.

Also on October 11, 1995, OPRF filed a counterclaim appealing the Level II hearing officer's decision. The parties then filed cross-motions for summary judgment on Count 8 of the Does' complaint and OPRF's counterclaim. The district court granted summary judgment in favor of OPRF on both issues on July 10, 1996. The dis-

trict court found that the IDEA did not require OPRF to continue to provide educational services to a student who has been expelled for reasons unrelated to his disability and that, by his actions, John forfeited his right to the "free appropriate public education" required by the IDEA. Similarly, the court found that OPRF was not required by the IDEA to stay John's placement during the due process hearings absent a relationship between the misconduct at issue and the child's disability. With respect to OPRF's counterclaim, the district court determined that the Level II hearing officer had relied on certain facts that were not properly dispositive of the issue at hand. The court found that OPRF had "reasonably protected" John's rights and that its decision was reasonably informed; thus the court concluded that OPRF had properly found that John's misconduct was not related to his learning disability.

The plaintiffs appeal each of the district court's decisions,[1] and we affirm.

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[1] The plaintiffs have also filed a Motion to Vacate Decision for Want of Jurisdiction, basing that motion on the fact that the full administrative record was not filed with the district court. They argue that such filing was required by 105 Ill. Comp. Stat. 5/14-8.02(k) (West 1997) and §1415(e)(2) of the IDEA. As a result, the Does argue that the district court should have dismissed OPRF's counterclaim because the defendant failed to serve the Illinois State Board of Education ("ISBE") within one year of filing its counterclaim. They contend that, because ISBE is the official custodian of the administrative record in this case, service upon it was necessary, but it was not made a party within the 120 days required under F.R.C.P. 4(m).

It is not necessary to vacate the district court's decision, because the court had before it all portions of the administrative record necessary to make a decision on the parties' cross-motions for summary judgment. The Does have not

(continued...)

I.

Despite his learning disability, John has been mainstreamed in all academic areas since the 1991-1992 school year. On February 16, 1994, a Multi-disciplinary Conference ("MDC") was held to consider John's graduation from junior high school and his admission into high school. OPRF personnel recommended that John receive the services of a resource room for learning disabilities support and that he not take biology as a freshman. However, Mrs. Doe requested the elimination of these services and enrolled John in biology.

John and his parents have acknowledged that they received copies of OPRF regulations on the use of illegal substances in connection with John's participation in a sport where the use of illegal substances was prohibited (R. 59 at 11-12). In addition, on the morning of September 9, 1994, the school district's rules of conduct, including rules relating to illegal substances, were reviewed for all students during a homeroom period, and John admitted he was there at the time the rules of conduct were explained (R. 44, Ex. A at 19; R. 80 at 4). It was later that night that John was discovered in possession of marijuana at the freshman dance.

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[1] (...continued)

argued to this Court that John was denied an opportunity to present any relevant evidence to the district court, and we find their conclusory assertions that they were prejudiced by incompleteness in the record unpersuasive. Moreover, the absence of ISBE in this action mandates dismissal only if ISBE is an indispensable party, which it is not. See F.R.C.P. 19(b). Indispensability is an equitable, not a jurisdictional, doctrine. See *Landau & Cleary, Inc. v. Hribar Trucking, Inc.*, 867 F.2d 996, 997 n.1 (7th Cir. 1989); *Graf v. Elgin, Joliet and Eastern Railway Co.*, 697 F.2d 771, 775 (7th Cir. 1983). For all these reasons, this Court will not vacate the decision.

On September 19, 1994, OPRF conducted another MDC for John that had the purpose of determining whether his misconduct in bringing the marijuana to school was related to his learning disability. The MDC team determined that no such relationship existed. None of John's current teachers or former service providers from his junior high school were in attendance, and of the MDC team, only the school psychologist, Dr. DeRose-Ihrig, had spoken with John or reviewed his record prior to the MDC. OPRF refused the Does' request that OPRF provide John with an Attention Deficit Hyperactivity Disorder ("ADHD") evaluation prior to determining whether his behavior was related to his disability, although Dr. DeRose-Ihrig noted the need for an ADHD evaluation. The MDC team also reiterated that John was eligible for learning disability resource and support services. The resource room recommendation which had been made at the February 1994 MDC and eliminated at Mrs. Doe's request was reinstated by the MDC team.

A separate hearing was also convened on September 19, 1994, to consider John's expulsion. John and his parents were represented by an attorney, who presented a case based on mitigation. The attorney presented witnesses and other testimony, cross-examined OPRF witnesses and otherwise advocated for John. The hearing lasted five hours and was tape recorded. A "Summary of Evidence" from the hearing was submitted to the Administrative Review Committee ("ARC"), which was comprised of school district administrators, and the ARC recommended that John be expelled for the remainder of the semester in accordance with the OPRF Code of Conduct. The Does were not allowed to object, correct or supplement the Summary of Evidence. Around September 22, 1994, the ARC's recommendation was accepted by the Board, and John was expelled.

Standard of Review

Whether a school district has satisfied the requirements of the IDEA is a mixed question of law and fact, which this Court reviews *de novo*. *Board of Education of Murphysboro v. Illinois State Board of Education*, 41 F.3d 1162, 1166 (7th Cir. 1994). Absent a mistake of law, this Court must review the district court's decision for clear error. See *id.* at 1166-1167. We review *de novo* all other issues on which the district court granted summary judgment. See *Border v. City of Crystal Lake*, 75 F.3d 270, 272 (7th Cir. 1996).

II.

Alternative Educational Services Requirement

The Does first argue that the IDEA required OPRF to offer alternative educational services to John during the time his due process hearing was pending. Their primary argument in this regard is that the Department of Education's Office for Special Education Programs ("OSEP"), the federal government entity which is responsible for administering the IDEA, has interpreted the IDEA to require the continuation of appropriate alternative services for any students with disabilities who are expelled from their regular classroom setting, regardless of the relationship of a student's misbehavior to his or her disability. The Does assert that OSEP's interpretation must be binding here, when the controversy is between a school district and a student on whose behalf the school district accepts federal funds, citing *Metropolitan School District of Wayne Township v. Davila*, 969 F.2d 485, 493 (7th Cir. 1992), certiorari denied, 507 U.S. 949. Moreover, they believe that OSEP's interpretative ruling is persuasive and accordingly entitled to deference, based on the IDEA, its legislative history and judicial precedent, citing *Kaelin v. Grubbs*, 682 F.2d 595, 600, 602 (6th Cir. 1982); *S-1 v. Turlington*, 635 F.2d 342, 348 (5th

Cir. 1981), certiorari denied, 454 U.S. 1030; *Board of Education of the City of Peoria v. Illinois State Board of Education*, 531 F. Supp. 148, 151 (N.D. Ill. 1982). On behalf of the Department of Education, the United States, as *amicus curiae*, has filed a brief in this Court in support of this argument for reversal.[2]

The provision of the IDEA in question provides that in order to qualify for federal funds, a state must show that it "has in effect a policy that assures all children with disabilities the right to a free appropriate public educa-

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[2] The Does also point to the Illinois Administrative Code for support for the argument that OPRF was required to provide alternative educational services to John. Section 226.595 of Title 23 of the Illinois Administrative Code (1996) provides that a special education student's educational services may be terminated only following a conference at which it is concluded that "such placement is no longer required, and that termination of the placement is in the best interests of the child, or that the child was inappropriately placed." The Does say that there was no such determination made for John, so that his services were illegally terminated in violation of the Illinois Administrative Code.

We were unable to find any Illinois court decisions construing this provision, but it appears to speak only to the complete termination of special education services, rather than a temporary suspension of the services being provided. (In fact, it is titled "Termination of Special Education Services.") In the case at hand, John's return to school and to his special education services there were never in question. More importantly, we find the reasoning in our discussion above—concluding that the IDEA does not require OPRF to continue to provide alternative educational services to John after his misbehavior has been found to be unrelated to his disability—is also persuasive on this point. Once a student's misbehavior has been found to be unrelated to his or her disability, there is no justification for treating him or her differently from the non-disabled child. Under those circumstances, the conference described in §226.595 is not required.

tion." 20 U.S.C. §1412(1). The crux of the issue at hand appears to be on which word in the preceding provision the parties place the emphasis. The Does and OSEP emphasize the "all" in that phrase, and note that there is no exception in the IDEA for termination of services for misbehavior unrelated to a child's disability. Therefore, they argue, OPRF was required to provide John with special education services during his expulsion. OPRF and the district court, on the other hand, emphasize the word "right," concluding that, like other rights, it may be forfeited and assert that is just what happened in this case.

As discussed in more detail in the next section of this opinion, the Supreme Court's decision in *Honig v. Doe*, 484 U.S. 305, is not dispositive on this issue, in that the Court's decision was limited to holding that under the "stay-put" provision of the IDEA students with disabilities may not be expelled unilaterally for misconduct *"growing out of their disabilities." Id.* at 308 (emphasis added). In addition, the only other Circuit until recently to rule on this issue held that if a handicapped child's misconduct is properly determined in an MDC not to be a result of his or her handicap, then the child can be expelled and during the expulsion all educational services may cease. *Doe v. Maher*, 793 F.2d 1470, 1482 (9th Cir. 1986), affirmed as modified *sub nom.*, *Honig v. Doe*, 484 U.S. 305. The Ninth Circuit reasoned that:

> When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. Therefore, when a handicapped child is properly expelled, the school district may cease providing all educational services—just as it could in any other case. To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad,

> are fairly attributable to his handicap. We know that is not so.

Id. This part of the Ninth Circuit's opinion was left undisturbed by the Supreme Court on certiorari in *Honig v. Doe.*

The Fourth Circuit has recently addressed the exact issue at hand in an *en banc* decision in *Virginia v. Riley*, 106 F.3d 559 (4th Cir. 1997). In that case, the United States Department of Education had threatened to withhold Virginia's entire IDEA grant for fiscal years 1994 and 1995 unless Virginia changed its policy allowing the state to cease providing free education to disabled students who are expelled for misbehavior unrelated to their disabilities. Virginia argued *inter alia* that in order to place conditions on a state's receipt of federal funds, Congress must clearly show an unambiguous intent to do so in the terms of the statute, and that the IDEA showed no such intent. The Fourth Circuit, sitting *en banc*, agreed, finding that the "plain language of the IDEA does not, even implicitly, condition the receipt of IDEA funding on the continued provision of educational services to disabled students who are expelled . . . due to serious misconduct wholly unrelated to their disabilities." *Id.* at 561.

There is no need to reiterate the entirety of the Fourth Circuit's reasoning on this matter, but a few points bear repeating: First, the court emphasized that §1412(1) only required the State to provide "all" handicapped children with the "right" (*i.e.*, access) to a free appropriate public education, "[a]nd, as with any other right, that right of access to educational services may be forfeited by criminal or other conduct antithetical to the right itself." *Id.* at 563. The court found that nothing in the purpose of the IDEA required a contrary holding, noting the codified purpose of the IDEA, which is "*to have available to* [disabled students] . . . a free appropriate public educa-

tion which emphasizes special education and related services designed to meet their unique needs . . . ." 20 U.S.C. §1400(c) (emphasis added). Moreover, the court—relying on *South Dakota v. Dole*, 483 U.S. 203, and *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1—found that, even if another interpretation of §1412(1) were possible:

> [N]either the text of section 1412(1), the legislative history, nor the purpose of the IDEA even suggests, much less mandates with the clarity necessary to confirm that the Congress actually confronted and deliberately decided, that a state must continue to provide education services to disabled children after expulsion for misconduct unrelated to their disabilities.

Id. at 568. Therefore, it held the Department of Education's contrary position *ultra vires*. *Id.*

This Court is in agreement with the reasoning of both the Ninth and Fourth Circuits on this issue. The cases cited by plaintiffs do not lead to a contrary result in that the issue at hand was addressed only in dicta, summarily and without any analysis.[3] We simply conclude that

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[3] For example, the Fifth Circuit in *S-1 v. Turlington*, 635 F.2d at 348, concluded in dicta only that:

> expulsion is still a proper disciplinary tool under the [IDEA] and section 504 [of the Rehabilitation Act of 1973] when proper procedures are utilized and under proper circumstances. We cannot, however, authorize the complete cessation of educational services during an expulsion period.

Kaelin v. Grubbs (682 F.2d at 600, 602) and *Board of Education of the City of Peoria v. Illinois State Board of Education* (531 F. Supp. at 151) (*supra*) merely cite and repeat *Turlington*'s conclusory dicta. We find none of these opinions persuasive, because they contain no thoughtful discussion regarding

(continued...)

the rationale and result of the Fourth Circuit's opinion in *Riley* and the Ninth Circuit's opinion in *Maher* are more persuasive.[4] Accordingly, we find that OPRF did

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[3] (...continued)

the relationship of the expelled student's misbehavior to his or her disability in connection with the conclusion that educational services must be maintained. In addition, the opinions contain no discussion regarding whether cessation of special education services may be proper under some circumstances.

[4] We are not persuaded by the Does' argument that the Improving America's Schools Act of 1994, Pub. L. 103-382, 108 Stat. 3518 (enacted October 20, 1994), which *inter alia* amended the IDEA's "stay-put" provision, has any bearing on the issue at hand. Section 314 of that Act amends the "stay-put" provision to provide that a student with a disability who brings a weapon to school, and thus who is subject to the one-year automatic suspension requirement of the Gun-Free Schools Act of 1994, 20 U.S.C. §8921, *may* be placed in an interim alternative educational setting for up to 45 days, at school district expense. The Does appear to argue that if Congress chose not to provide for automatic termination of services even when a weapon is involved, then they could not have meant that services can be terminated by a school district when the misbehavior is less serious.

The Does' argument is weak for several reasons. First, the language of the statute is that the school district "may" continue to provide services; no one is arguing in this case that the school district cannot choose to pay for alternative special education services when students are expelled for misbehavior unrelated to their disability. Second, and more importantly, the Act's amendment of the "stay-put" provision simply does not appear to this Court to bear on the issue we discuss in the next section of this opinion: whether the "stay-put" provision applies at all in the case where a student's misbehavior is unrelated to his disability. Finally, the relevant section of the Act also directs that nothing in the IDEA should supersede the Gun-Free Schools Act with respect to children whose misconduct is unrelated to their disabilities, which suggests that Congress recognized that under the IDEA a student

(continued...)

not violate the IDEA when it did not provide alternative services to John during his expulsion.

IDEA "Stay-Put" Provision

The Does also argue that OPRF's refusal to stay John's special education placement during the pendency of his due process hearings violated the "stay-put" provision of the IDEA, 20 U.S.C. §1415(e)(3)(A), which provides:

> [D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child . . . .

The Does maintain that this issue is controlled by the Supreme Court's decision in *Honig v. Doe*, 484 U.S. 305, discussed briefly above, a case that also involved the expulsion of special education students. But we disagree. In that case, a California school district, like OPRF, contended that it could expel a special education student for violent and disruptive conduct without retaining the child's placement in the public schools during the pendency of the due process hearing. While the Supreme Court stated that they would not read a "dangerousness" exception into the "stay-put" provision because the Court was "not at liberty to engraft onto the statute an exception Congress chose not to create," *id.* at 325, there is one critical distinction between *Honig* and the case at hand: In *Honig*, the dispute grew "out of the efforts of certain officials of the [school district] to expel two emotionally disturbed children from school indefinitely for

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[4] (...continued)

who brings a gun to school for reasons totally unrelated to his disability otherwise may be treated differently than one whose conduct is related to his disability.

violent and disruptive conduct *related to their disabilities*." *Id.* at 312 (emphasis added). Indeed, the Supreme Court stated the issue as "whether . . . state or local school authorities may nevertheless unilaterally exclude disabled children from the classroom for dangerous or disruptive conduct *growing out of their disabilities*." *Id.* at 308 (emphasis added). And in fact that very same distinction was recognized by the Ninth Circuit in the *Honig* case, when it specifically held that a disabled student could be expelled for misbehavior unrelated to his or her handicap. *Doe v. Maher*, 793 F.2d at 1482. The Supreme Court did not disturb that part of the Ninth Circuit's opinion in its opinion. The Supreme Court simply has not spoken directly on the issue at hand, *viz.*, whether OPRF was required to stay John's placement in its high school when his infraction was found not to be a result of his learning disability.

OPRF argues that rather than apply the rigid approach of an automatic stay in a case like this, which would give a special education student with even a slight learning disability an avenue to delay expulsion indefinitely, decisions about whether students should be kept in school in this situation should be made on a case-by-case basis under the model suggested in *Rodiriecus L. v. Waukegan School District No. 60*, 90 F.3d 249 (7th Cir. 1996). In *Rodiriecus*, the plaintiffs argued that the school district was prohibited from expelling Rodiriecus under the "stay-put" provision of the IDEA because he was in the process of being evaluated for special education purposes at the time of his expulsion. In response, this Court stated:

> If the stay put provision is automatically applied to every student who files an application for special education, then an avenue will be open for disruptive, non-disabled students to forestall any attempts at routine discipline by simply requesting a disability evaluation and demanding to 'stay put,' thus disrupt-

> ing the educational goals of an already overburdened and of [sic] times classified as a chaotic public school system.

Id. at 253. Instead, the Court looked to the four factors used in deciding whether to grant a preliminary injunction—likelihood of success on the merits, irreparableness of harm, weighing of harms, and the public interest—and held that the "stay-put" provision applies to a child who was not previously diagnosed as disabled only if school officials knew or reasonably should have known that the student was disabled. *Id.* at 254.

OPRF would have this Court find the reasoning in *Rodiriecus* equally applicable to this case, arguing that if we adopt the Does' position, then any student with a disability who was threatened with expulsion could avoid that expulsion for a lengthy period by filing a due process request under the IDEA, even if the misbehavior forming the basis of the expulsion was clearly unrelated to the student's disability. In a related argument, OPRF argues that this case falls within the confines of *Rodiriecus* because the Does are asserting that John's misbehavior related to an *undiagnosed* disability—ADHD. This argument has some appeal, but it is unnecessary to address it directly because the district court was correct that the "stay-put" provision of the IDEA is not implicated in a case like this, where the school district has made a reasoned determination following the procedures of the IDEA that a student's misbehavior is unrelated to his disability. Cf. *Board of Education of Community High School District No. 218 v. Illinois State Board of Education*, 103 F.3d 545, 548 (7th Cir. 1996) (Discussing "stay-put" provision and stating that if "the behavior that triggered the expulsion could have been caused by the child's disability, [then] the procedural protections of the IDEA, rather than the disciplinary measures of the school, were warranted," suggesting that converse is true as well); *Doe v. Maher*, 793 F.2d at

1482. As discussed above, we conclude that the IDEA does not express an intent, either expressly or impliedly, to shield special education students from the normal consequences of their misconduct if that misconduct has nothing to do with their disabilities. "The [IDEA] was not designed to act as a shield to protect a disruptive child from routine and appropriate school discipline." *Rodiriecus*, 90 F.3d at 255.[5]

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[5] The same reasoning disposes of another of the Does' arguments: that the Level II hearing officer appropriately found that OPRF violated the law when it refused to re-evaluate John prior to his expulsion. In that regard, they direct our attention to 34 C.F.R. 104.35, which was enacted pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (the "Rehabilitation Act"). That regulation requires a school to conduct a pre-placement evaluation whenever there is any "subsequent significant change in placement" for a special education student. 34 C.F.R. 104.35(a). The Does argue that because the Supreme Court held in *Honig v. Doe*, 484 U.S. 305, that expulsion constitutes a significant change in placement, John's proposed expulsion should have triggered an evaluation pursuant to both Section 504 of the Rehabilitation Act and the IDEA. They claim that OPRF's September 19, 1994 MDC placement decision violated these requirements because "OPRF failed to provide current evaluative data, failed to evaluate for ADHD despite its own psychologist's suggestion and parents' request and failed to include on the MDC team *any* persons knowledgeable about John Doe." (Appellants' Brief p. 43) (emphasis in original). The Does also claim that the IDEA required OPRF to consider the educational impact of each placement decision, in this case the expulsion, and the MDC team failed to do so.

We will not repeat our reasoning in the first two sections of this opinion, but that reasoning is equally applicable to these assertions. There was no violation of the IDEA or the Rehabilitation Act in connection with John's expulsion, because the MDC properly determined that his misconduct was not related to his learning disability. Neither the IDEA nor the Rehabilitation Act should be read to protect John from the consequences of such misconduct.

In this case, the MDC team charged with determining whether John's misbehavior related to his learning disability decided unanimously that it did not. (R. 81, Ex. 5; R. 80 at 3). As discussed below, they made that decision using procedures that did not violate the IDEA or John's due process rights. As a result, the "stay-put" provision of the IDEA was simply not implicated.

III.

The Does also claim that OPRF did not comply with IDEA's due process requirements in connection with its decision to expel John. They argue that OPRF failed to comply with the IDEA in the following manner:

1. Plaintiffs were notified by letter dated September 13, 1994, of an MDC meeting set for September 16, 1994, and which was later moved to September 19, 1994. The notice did not say that termination of services or a change in John's placement would be discussed at the meeting. The Does argue that this notice did not give the ten-days' notice required by 23 Ill. Admin. Code tit. 23, §226.520 (1996) and did not allow the Does to adequately prepare for the MDC meeting.

2. John was expelled within three days after the MDC. The Does argue that this violates §226.590 and §226.595 of Title 23 of the Illinois Administrative Code (1996), which required ten-days' notice prior to a change in educational placement or termination of special services.

Plaintiffs argue that as a result of the foregoing, they were prejudiced because John was expelled and they were not given a reasonable opportunity to obtain an independent evaluation in order to persuade OPRF that his misbehavior was related to his unevaluated ADHD. Therefore, they argue that the Level II hearing officer

correctly found that OPRF had violated John's rights by giving them less than ten days prior to the MDC meeting in which they could obtain an independent evaluation.

OPRF argues, and the district court found, that the Does' claim that John had ADHD is unconvincing, and furthermore that such a condition, even if it existed, did not cause his misconduct. We agree with OPRF that the testimony of Dr. Meade and Ms. Fouks at the due process hearings is far from absolutely convincing in demonstrating that John had Attention Deficit Disorder ("ADD") or ADHD and that his misconduct was related to his disability. For example, Dr. Meade testified that John did not test positive for inhibitory control or impulse problems (R. 81, Ex. 3 at 246-247), and he also stated:

> I think it's a toss-up right now how much of [John]'s inattention in the classroom would be due to avoidance behavior, that is the anxiety associated with not being able to perform well and trying to sort of distract himself and avoid the task of really getting down and working versus a primary ADHD process. So there is—it's six of one, half dozen of another with [John].

R. 62, Ex. 22 at 256-257. Even if John had ADD or ADHD, this Court notes the testimony of witnesses at the hearings disclosing that John had control of his conduct when he knew the rules (R. 81, Ex. 3 at 282) and other evidence that John knew that OPRF prohibited possession of marijuana at school functions (*e.g.*, R. 44, Exs. A and D). We agree with the Level I hearing officer and the district court that John's decision to bring marijuana to a school dance appears to have been calculated, rather than impulsive. As a result of all of these factors, there was little likelihood that an ADHD evaluation would have affected the outcome of the MDC's de-

termination that John's misconduct was unrelated to his disability. See, *e.g.*, *Doe v. Maher*, 793 F.2d at 1480 n. 8 (a handicapped child's misconduct is related to his handicap "only if the handicap significantly impairs the child's behavioral controls").

We note the Ninth Circuit's following example in *Doe v. Maher* of a case where a handicapped child's misconduct would *not* trigger the protections of the IDEA:

> An example of such attenuated conduct would be a case where a child's physical handicap results in his loss of self-esteem, and the child consciously misbehaves in order to gain attention, or win the approval, of his peers. Although such a scenario may be common among handicapped children, it is no less common among children suffering from low self-esteem for other, equally tragic reasons.

793 F.2d at 1480 n. 8. Like that example, in the present case both Dr. Meade's and Ms. Fouks' testimony very specifically stated that John's learning disability has resulted in his low self-esteem, which then results in John consciously misbehaving to gain the attention or win the approval of his peers. (R. 62, Ex. 2 at 189; R. 81, Ex. 3 at 280-281). We agree with the Ninth Circuit's conclusion that such attenuated conduct cannot trigger the protections of the IDEA. Therefore, while the amount of due process afforded the Does by OPRF was not excessive, the Does were not prejudiced by having less than ten days in which they could obtain an ADHD evaluation for John, and OPRF did not violate the IDEA in this regard.[6]

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[6] The Does' argument that the Level II hearing officer correctly found that John's original inappropriate placement was a violation of the Does' rights is easily disposed of, in that it

(continued...)

IV.

The only other argument put forth by the Does that merits discussion is their claim that the district court erroneously granted summary judgment to OPRF on John's state and federal due process claims, because material issues of fact existed as to whether the process afforded to John in connection with his expulsion was meaningful. The plaintiffs assert that the district court improperly found that John's mitigation evidence was heard by the Board because a tape of the hearing was available for the Board. The Does argue instead that OPRF has admitted that only the "Summary of Evi-

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[6] (...continued)

was Mrs. Doe who made the decision to stop resource services and to enroll John in biology class.

The Does also claim that OPRF did not appropriately prepare for John's return to the public school setting, noting the Level II hearing officer's findings that no steps were taken by OPRF to convene a staffing to plan for John's return and that it was only at the Does' request that OPRF convened an MDC to consider John's independent evaluation and design an appropriate Individualized Education Plan ("IEP"). The Does maintain that OPRF "indisputably" was not prepared to properly place John for the spring term following his expulsion. They assert that the Level II hearing officer's conclusion in that regard was fully supported in the record and was relevant to his holding that John's continued private placement was appropriate (*i.e.*, reimbursable by OPRF). However, as noted by the district court, at the Level II hearing Mr. Doe admitted that he received a letter from OPRF dated November 8, 1994, stating that OPRF was willing to conduct a re-evaluation and to proceed to complete testing so that a staffing could be scheduled for John's return. (R. 81, Ex. 7 at 78-80; R.100 at 16). The Does' failure to make a request for an MDC following that letter until January 25, 1995 (an MDC was convened one month later) does not support the conclusion that John's placement at a private school during the Spring 1995 semester should be reimbursed by OPRF.

dence," the MDC report and the ARC report were submitted to the Board. As a result, the plaintiffs maintain that the district court's grant of summary judgment based upon this "erroneous" finding of fact should be reversed.

It is less than obvious that the Board was required as a matter of law to consider *any* mitigating factors. Nevertheless, after reviewing the "Summary of Evidence" prepared for the Board, we agree with the district court's conclusion that the basic outline of the Does' defenses to expulsion were included in that document, even if not every part of their argument was presented in the Summary. For example, the Summary contains the following description of the Does' attorney's closing statement:

> [The Does' attorney] said the parents understand the gravity of the situation and are not dismissing the offense as unimportant. They are respectful of the school's position and they need help in dealing with this situation. [John] is a young freshman at 13 years of age and is not up to task. *She asks that the board take his special education LD status into consideration in reviewing his case.* He is not a harm to others and no testimony was received that showed he tried to sell to others. There has only been an allegation of possession, and throughout the investigation he has been cooperative and respectful.

(R. 44, Ex. K at 6) (emphasis added). In addition, even if it is unclear whether the tape of the expulsion hearing was given to the Board for its decision-making, there is no evidence that the tape was not readily available if the Board wanted to listen to it.

Both parties to this action appear to agree that OPRF was required to provide some due process to the Does before expelling John, meaning due process that is more than a rubber stamp or sham. See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545-546. We con-

clude, after independently reviewing the record, that OPRF acted properly.

V.

For the reasons discussed above, the decision of the district court is AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 23, 1997

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

JOHN DOE, by and through his parents and next friends and the class of all others similarly situated, JANE DOE, next friend and JOE DOE, next friend,

Plaintiffs and Counter-Defendants-Appellants,

No. 96-3014 *vs.*

BOARD OF EDUCATION OF OAK PARK & RIVER FOREST HIGH SCHOOL DISTRICT 200, NANCY SMILEY, DONALD OFFERMANN, STEPHEN C. BRUNER, both in their official capacities and as individuals, et al.,

Defendants and Counter-Plaintiffs-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 C 6449—**Charles P. Kocoras**, *Judge*.

ORDER

The slip opinion released May 27, 1997, is amended by the addition of the following:

ADDENDUM

On June 4, 1997, after this Opinion was issued, the President signed H.R. 5, which amended the "free appropriate public education" requirement of the IDEA to provide that a State eligible for funds under the IDEA must demonstrate that it has in effect policies that ensure:

> A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, *including children with disabilities who have been suspended or expelled from school.*

H.R. §612(a)(1) (emphasis added). There is no retroactivity clause in this legislation, and application of the amendment would have a truly retroactive effect—it would increase a party's liability for past conduct. Under these circumstances, and although this amendment in the future will undoubtedly lead to a result different from the one reached in the first section of Part II of this Opinion, we will not apply this amendment retroactively to our decision in this case. See *Landgraf v. UST Film Products,* 511 U.S. 244.

On June 10, 1997, appellants filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the panel have voted to deny rehearing and no judge in active service has requested a vote on the suggestion for rehearing en banc. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Not Reported in F.Supp.
17 A.D.D. 966
(Cite as: 1996 WL 392160 (N.D.Ill.))

John DOE, By and Through his parents and next friends Joe and Jane DOE, and the class of all others similarly situated, Plaintiffs/Counter-Defendants,

v.

BOARD OF EDUCATION OF OAK PARK & RIVER FOREST HIGH SCHOOL DISTRICT 200, et al., Defendant/Counter-Plaintiffs,

and

Illinois State Board of Education, Defendant.

No. 94 C 6449.

United States District Court, N.D. Illinois, Eastern Division.

July 11, 1996.

MEMORANDUM OPINION

KOCORAS, District Judge:

This matter is before the court on Plaintiff's motion for clarification or reconsideration of this court's April 19, 1996 Memorandum Opinion and Defendant's motion for reconsideration of that same opinion. For the reasons set forth below, the plaintiff's motion is denied. The defendant's motion is granted.

DISCUSSION

It has been nearly two years since Plaintiff, John Doe ("Doe"), a then 13 year-old learning disabled freshman at Oak Park River Forest High School ("OPRF"), was discovered with marijuana while attending a freshman school dance. Defendant Board of Education of Oak Park River Forest High School District 200 ("the Board") issued a ten-day suspension to Doe as punishment for this activity, and Doe was ultimately expelled for the remainder of the fall semester. Two due process hearings and an eight-count complaint filed in federal court followed. Nearly two years and numerous dispositive motions later, the parties vigorously continue their dispute with virtually nothing amiably resolved.

On October 11, 1995, this court granted summary judgment in favor of the defendant as to Counts I-VII of the plaintiff's complaint. On February 15, 1996, this court denied summary judgment in favor of the plaintiff as to Count VIII. By virtue of a motion for reconsideration and in light of a recently published opinion letter issued by the Office of Special Education Programs ("OSEP"), however, the court on April 19, 1996, reconsidered that portion of its February opinion which concerned the issue of whether the school district was obligated to continue providing services to special education students who had been properly expelled. See 23 IDELR 894-95. OSEP's position as to that issue was in the affirmative, and the court, expressing reservations with the policies endorsed by OSEP, nevertheless decided to afford deference to OSEP solely as to that issue. Summary judgment in favor of the plaintiff was thus granted as to Count VIII. As to all other issues the plaintiff's motion for reconsideration was denied.

Seemingly dissatisfied, the plaintiff now seeks clarification and/or reconsideration of a second issue, i.e., the question of the Individuals With Disabilities Education Act's ("IDEA") stay-put provision. See 20 U.S.C. § 1415(e)(3). As indicated above, however, the court expressly declined reconsideration of this issue on April 19, 1996, and we do not feel inclined to revisit it at the present time.[1] In our February 15, 1996 Memorandum Opinion, the court made clear that neither the Supreme Court nor the IDEA mandates the enforcement of a stay-put provision where the student's misconduct is found to be unrelated to his disability. Once the school district has properly made such a determination, the school district is authorized to treat the case as any other—i.e., it may cease providing educational services, as would be its right in any other case. See *Doe v. Maher,* 793 F.2d 1470, 1482 (9th Cir.1986), aff'd as modified, Honig v. Doe, 484 U.S. 305 (1988). The student whose misconduct is unrelated to his disability is entitled to no more.

In the present case, Doe's act of bringing marijuana to a school dance was found by the school district to be unrelated to his disabilities. In so finding, the defendant's adherence to due process was quite possibly on the sparse end of the spectrum, but the rights of the student were nevertheless reasonably protected and the district's actions were reasonably informed. That Doe has now been independently evaluated as having Attention Deficit Hyperactive Disorder ("ADHD") does not change the propriety of the district's actions. As we noted in our

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[1] We likewise decline the plaintiff's suggestion that we should reconsider our October 11, 1995 opinion.

February 15, 1996 Memorandum Opinion, even assuming the presence of ADHD, little support existed in the record that, under the circumstances, the findings of the multi-disciplinary conference or the school district would have been significantly changed. Absent flagrant inequities, the court is hesitant to tread into the area of school discipline. Here, the school district made a reasoned determination that Doe's conduct was unrelated to his disabilities. That being so, the stay-put provision of IDEA was not implicated, and the plaintiff's motion for reconsideration as to that issue is denied.

One matter remains. As previously indicated, the court on April 19, 1996 afforded deference to an opinion letter issued by OSEP and reconsidered that portion of its February 15, 1996 opinion dealing with the school district's obligation to continue providing services to Doe even though his conduct was found to be unrelated to his disabilities. The defendant, noting that such deference was not warranted given the interpretive nature of the agency's letter and further noting the court's expressed lack of agreement with the agency's views on the issue, now seeks "reconsideration" as to the April 19, 1996 reconsideration. The defendant argues that the deference afforded by the court to the OSEP opinion letter constituted an error of law, effectively rendering administrative agencies such as OSEP super-legislatures by permitting them to issue opinions with legislative effect absent any review by affected parties or courts. Upon further reflection, we agree with the defendant. In *Raymond S. v. Ramirez*, 23 IDELR 965, 970 (N.D.Iowa 1996), the district court recently set forth the parameters for the standard of review for interpretive rules. As observed by the court:

> "Interpretive rules" have not been subjected to "notice-and-comment," but instead have been "'"issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."'" *Guernsey Memorial Hospital,* 115 S.Ct. at 1239 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n. 31 (1979), in turn quoting the Attorney General's Manual on the Administrative Procedure Act 30 n. 3 (1947)). Such "interpretive rules" do not have the force and effect of law and "are not accorded that weight in the adjudicatory process." *Guernsey Memorial Hosp.*, 115 S.Ct. at 1239; *St. Paul-Ramsey Medical Ctr.*, 50 F.3d at 527 n. 4; *Doe v. Reivitz*, 830 F.2d 1441, 1447 (7th Cir.1987). Although the courts may find such interpretations persuasive and treat them as if they were binding, the courts have the discretion to substitute their own judgment on all questions of statutory interpretation. See *St. Paul-Ramsey Medical Ctr.*, 50 F.3d at 527 n. 4 (citing *Guernsey*, 115 S.Ct. at 1238); *Reivitz*, 830 F.2d at 1447 (citing 2 K. Davis, Administrative Law Treatise § 7.11, at 55 (1979)). The preliminary power of the interpretation is in the agency, but the final power of interpretation is in the courts. Id.

Ramirez, 23 IDELR at 970. The policy endorsed by the OSEP opinion letter here relied upon by the court was clearly interpretative, not legislative. That being so, this court was entitled to defer to such a policy, but the court was not bound by it. To the contrary, we believe that OSEP's position requiring a school district to continue to provide services where the student's misconduct is found to be unrelated to the student's disability is based upon an erroneous extension of the Supreme Court's decision in *Honig v. Doe*, 484 U.S. 305 (1988). We further note that such a policy is not otherwise explicitly mandated by the IDEA. Accordingly, based on additional consider-

ation, we believe that the basis for our April 19, 1996 decision was flawed. We grant the defendant's motion for reconsideration. Summary judgment in favor of the plaintiff as to the entirety of Count VIII is denied.

CONCLUSION

For the reasons set forth above, the plaintiff's motion for clarification or reconsideration of this court's April 19, 1996 Memorandum Opinion is denied. The defendant's motion for reconsideration is granted.

Not Reported in F.Supp.
15 A.D.D. 487
(Cite as: 1996 WL 197690 (N.D.Ill.))

In re: JOHN DOE, by and through his parents and next friends Joe and Jane Doe, and the Class of all others similarly situated, Plaintiffs,

v.

BOARD of EDUCATION of OAK PARK RIVER FOREST HIGH SCHOOL DISTRICT 200, et al., Defendants.

No. 94 C 6449.

United States District Court, N.D. Illinois, Eastern Division.

April 22, 1996.

MEMORANDUM OPINION

KOCORAS, District Judge:

This matter is before the court on the plaintiff's motions for reconsideration of this court's October 11, 1995 and February 15, 1996 judgments in favor of the defendant. For the reasons set forth below, the plaintiff's motions are denied in part and granted in part.

LEGAL STANDARD

Motions for reconsideration generally serve a very narrow function and must be supported by a showing of

extraordinary circumstances justifying relief from judgment. *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 4000 (7th Cir. 1986). The rulings of a district court are not to be viewed "as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *Quaker Alloy Casting Co. v. Gulfco Industries, Inc.*, 123 F.R.D. 282, 288 (N.D.Ill 1988). Rather, motions for reconsideration are designed to correct manifest errors of law or fact or to present newly discovered evidence. *Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985). Accordingly, a motion for reconsideration is an "improper vehicle to introduce evidence previously available or to tender new legal theories." *Bally*, 804 F.2d at 404; see also *Quaker*, 123 F.R.D. at 288 (reconsideration of final rulings will not be granted to allow the losing party to rehash oral arguments or to present new legal arguments or facts which the party could have presented during the pendency of the underlying motion). With respect to the present motion for reconsideration, the court will address the parties' contentions with these principles in mind.

DISCUSSION

Plaintiff John Doe, a learning disabled freshman at Oak Park River Forest High School ("OPRF"), brought an eight-count complaint against Defendant Board of Education of Oak Park River Forest High School (the "Board") after the Board expelled Doe for possessing marijuana at an OPRF freshman dance. On October 11, 1995, this court granted summary judgment in favor of the defendant as to Counts I-VII of the plaintiff's complaint. On February 15, 1996, this court denied summary

judgment in favor of the plaintiff as to Count VIII. The plaintiff now seeks reconsideration of both decisions. However, given the requirement set forth in Rule 59 of the Federal Rules of Civil Procedure that motions for reconsideration be filed within 10 days after the entry of judgment, the plaintiff's motion with respect to the October 11, 1995 judgment is denied. Accordingly, the remainder of this opinion relates solely to the February 15, 1996 decision.

In our February 15, 1996 opinion, this court recognized that the protections of the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. § 1401 et seq., may be attenuated where special education students engage in misconduct unrelated to their disabilities. Although the IDEA sets forth a general directive that a free and appropriate public education ("FAPE") must be made available to all students with disabilities, the court observed that such a directive cannot be absolute, and under some circumstances (such as can be found in the present case), the right to a FAPE can be forfeited. In so concluding, the court noted the undesirable double standard which would otherwise result by affording disabled students free reign to commit wrongful acts without the fear of repercussion which is thrust upon students without disabilities. The court further noted the strain which would be placed on the school district should they be required to expend precious resources to continue providing special services to a disabled student who is sanctioned for conduct not linked to any disability. Accordingly, the court concluded that, where a student with a disability engages in misconduct found to be unrelated to that disability, the school district is entitled to treat that student as if he had no disability.

This is so even where the disabled student faced expulsion and the cessation of educational services.

The plaintiff, in asking the court to reconsider this portion of its February 15, 1996 opinion, cites to a recently published opinion letter issued by the Office of Special Education Programs ("OSEP"). See 23 IDELR 894-95. The OSEP opinion letter addresses the issue of whether a school district must continue to provide services to special education students who have been properly expelled. Id. OSEP responds in the affirmative, pronouncing that "under the free appropriate education requirements of Part B of the [IDEA] . . . all States receiving funds under Part B must continue to provide educational services to students with disabilities during periods of long-term suspension or expulsion from school for misconduct that is determined to be unrelated to their disability." Id. at 895 (emphasis added). The opinion continues:

> This Departmental policy is based on the requirement under IDEA that, as a condition for receipt of funds, States must ensure that FAPE is made available to all eligible children with disabilities in mandated age ranges; the statute does not include any exception for children who have been long-term suspended or expelled. This policy is further supported by legislative history of the Education of the Handicapped Act [the predecessor statute to IDEA] and by relevant judicial interpretations of the FAPE requirements in Part B.

Id.

Although we do not wholly agree with the policies endorsed by the OSEP opinion letter, we do recognize that the positions taken by OSEP are entitled to deference

and that the issue described in the OSEP opinion letter is virtually indistinguishable from the case at bar. As such, as to the portion of this court's February 15, 1996 opinion denying the plaintiff's motion for summary judgment as to Count VIII, the plaintiff's motion for reconsideration is granted. Pursuant to OSEP's policy and reading of the IDEA, the defendant was required to provide a free appropriate public education to Doe, as a disabled student, for the duration of his expulsion. This was so, even though Doe's misconduct was assessed as being unrelated to his disability. As to all other issues, the plaintiff's motion for reconsideration is denied.

CONCLUSION

For the reasons set forth above, the plaintiff's motions for reconsideration are denied in part and granted in part.

Not Reported in F.Supp.
15 A.D.D. 475
(Cite as: 1996 WL 79411 (N.D.Ill.))

John DOE, By and Through his parents and next friends Joe and Jane DOE, and the Class of all other similarly situated,
Plaintiff/Counter-Defendants,
v.
BOARD OF EDUCATION OF OAK PARK & RIVER FOREST HIGH SCHOOL DISTRICT 200, et al.,
Defendant/Counter-Plaintiff,
and
Illinois State Board of Education,
Defendant.

No. 94 C 6449.

United States District Court, N.D. Illinois.

Feb. 16, 1996.

MEMORANDUM OPINION

KOCORAS, District Judge:

This matter is before the court on the plaintiffs' motion for summary judgment as to Count VIII of the plaintiffs' complaint and the parties cross-motions for summary judgment as to the defendants' counter-claim. For the reasons set forth below, the plaintiffs' motion as to Count VIII is denied. The plaintiffs' motion as to the defendants' counter-claim is denied. The defendants' motion as to the counter-claim is granted.

BACKGROUND

On September 9, 1994, Plaintiff John Doe ("Doe"), a 13 year-old learning disabled freshman at Oak Park River Forest High School ("OPRF"), allegedly was found to be in possession of a pipe and a small amount of marijuana at a freshman dance. As punishment for this activity, the OPRF Board of Education ("the Board") issued a ten-day suspension to Doe and subsequently expelled him for the remainder of the fall semester. Doe thereafter filed an eight-count complaint against the Board and OPRF administrators alleging that these punishments were unlawful. The present motions pertain to Count VIII of the plaintiff's complaint and to a counter-claim filed by the Defendant Board. Count VIII of the plaintiff's complaint alleges that OPRF's policy of not offering alternative educational services during expulsions violated Doe's and others' rights as special education students under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq. The defendants' counter-claim seeks review and reversal, pursuant to 20 U.S.C. § 1415(e), of an administrative decision regarding the expulsion of Doe from OPRF for the first semester of the 1994-95 school year.

Although classified as learning disabled,[1] Doe has been

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[1] Although Doe's achievement test scores were not nearly so low, the plaintiffs maintain that Doe possesses a fourth grade reading ability, first grade handwriting ability, third grade spelling ability and a sixth grade math ability. The plaintiffs further maintain that Doe suffers from Attention Deficit Hyperactivity Disorder ("ADHD"), low self-esteem, poor impulse control, and poor judgment. The defendants admit that Doe was a special education student. However, the defendants do not agree with the ADHD assessment or with the extent of Doe's alleged problems.

mainstreamed in all academic areas since the 1991-92 school year. In January 1992, while Doe was still in elementary school, Doe was reevaluated. His handicapping characteristic of learning disabled was not changed, and Doe was placed in a regular classroom with consultative services to work towards improvement of organization and study skills. On February 16, 1994, a staffing was held at Doe's elementary school district. The district personnel recommended that Doe receive special education services via a resource room for learning disabilities support and that Doe not take biology as a freshman. The district recommendation notwithstanding, Mrs. Doe requested the elimination of these services and enrolled Doe in biology, abiding by a comment made by an elementary school psychologist to the effect that Doe's learning problems were almost non-existent. The effect of Mrs. Doe's requests was to reduce the amount of special education services for her son and to increase his academic load.

At the beginning of Doe's freshman year at OPRF, Doe participated in a sport where the use of illegal substances was prohibited. Doe and his parents acknowledge that they received copies of the OPRF regulations on the subject. In addition, on the morning of September 9, 1994, the school district's rules of conduct were reviewed by staff for all students during a homeroom period. Doe admits that he was in attendance. Later that night, Doe was discovered in possession of marijuana at a school dance on school grounds.

On September 19, 1994, a multi-disciplinary conference ("MDC") for Doe was conducted by OPRF representatives. The purpose of the meeting was to determine whether Doe's misconduct on September 9, 1994, was

related to a learning disability. The MDC team determined that no relationship existed between Doe's bringing marijuana to the school dance and his learning disability. Accordingly, the provision of the IDEA prohibiting the expulsion of a disabled student for misconduct related to his disability was not to be applied. Doe's goals were also reviewed at the MDC, and it was reiterated that Doe was eligible for learning disability resource services and support services. The resource room recommendation which had been made at the February 1994 staffing and eliminated at Mrs. Doe's request was subsequently reinstated.

A separate expulsion hearing likewise convened on September 19, 1994. At the hearing, Doe and his parents were represented by an attorney who presented witnesses and other testimony, cross-examined OPRF witnesses, and otherwise acted in Doe's behalf. The hearing lasted approximately five hours and was tape recorded. On or about September 20, 1994, a seven page "Summary of Evidence" was submitted to the Administrative Review Committee ("ARC"). The ARC recommended that Doe be expelled for the remainder of the semester in accordance with the OPRF Code of Conduct. On or about September 22, 1994, the ARC's recommendation was accepted by the Board, and Doe was expelled.

On September 23, 1994, the Does filed a due process request under the IDEA, seeking, inter alia, that Doe's expulsion be rescinded and that Doe be provided an evaluation for Attention Deficit Hyperactive Disorder ("ADHD") or Attention Deficit Disorder ("ADD"). A "Level I" due process hearing was held on November 28, 1994, and the decision to expel Doe was upheld as proper. The Does filed a second appeal and a "Level II" due process

hearing was held on March 13 and April 19, 1995. The Level II due process hearing officer reversed the Level I decision which affirmed the Board's expulsion. On October 12, 1995, this court held that the expulsion hearing procedures which Doe was afforded were not violative of due process. The plaintiffs now move for summary judgment as to the plaintiffs' IDEA claim. The parties have filed cross-motions for summary judgment as to the defendants' counter-claim.

LEGAL STANDARD

Summary judgment is appropriate if the pleadings, answers to interrogatories, admissions, affidavits and other material show "that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R.Civ. P. 56(b). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party seeking summary judgment carries the initial burden of showing that no such issue of material fact exists. Pursuant to Rule 56(b), when a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue as to any material fact and that the moving party is not entitled to judgment as a matter of law. *Anderson*, 477 U.S. at 250.

In making our determination, we are to draw inferences from the record in the light most favorable to the non-moving party. We are not required, however, to draw every conceivable inference, but rather, only those that

are reasonable. *De Valk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 329 (7th Cir. 1987); *Bartman v. Allis-Chalmers Corp.*, 799 F.2d 311, 313 (7th Cir. 1986), cert. denied, 479 U.S. 1092 (1987). The nonmovant may not rest upon mere allegations in the pleadings or upon conclusory statements in affidavits; rather he must go beyond the pleadings and support his contentions with proper documentary evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Howland v. Kilquist*, 833 F.2d 639, 642 (7th Cir. 1987).

The plain language of Rule 56(c) mandates the entry of summary judgment against a party who fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. "In such a situation there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial". Id. at 323.

It is in consideration of these principles that we examine the parties' motions.

DISCUSSION

A. Count VIII: The IDEA

In *Honig v. Doe*, 484 U.S. 305 (1988), the Supreme Court held that a school district could not unilaterally exclude disabled children from the classroom for conduct growing out of their disabilities. In the present case, the plaintiffs ask us to extend the holding of Honig to prohibit the exclusion of disabled children for conduct not arising out of their disabilities. The plaintiffs argue

that educational services may not cease for such children regardless of the circumstances. For the reasons set forth below, we decline to so extend Honig or the IDEA.

Congress enacted the IDEA "to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs. . . ." 20 U.S.C. § 1400(c). The continued provision of educational services to a student who has been expelled for reasons unrelated to a disability is not expressly required by the IDEA or its regulations, nor is there any reason to believe that Congress intended to erect an impenetrable shield insulating students with disabilities from the consequences of misconduct totally unrelated to their disabilities. The plaintiffs correctly assert that Congress intended for disabled children to be afforded special protections. However, where such children engage in actions not stemming from any known incapacity, the protections of the IDEA lose much of their purpose.

The plaintiffs maintain that children with disabilities may not be subject to expulsion (and the accompanying discontinuation of educational services) by the school district regardless of whether or not their conduct relates to any disability. We find such a proposition to be without merit. In Honig, the Supreme Court expressly limited its holding to cases in which the infraction related to the disability. The position urged by the plaintiffs, however, extends the scope of the IDEA beyond what Congress intended. By affording protections to disabled children, the IDEA necessarily impinges on local control of schools. Congress deemed such an encroachment to be warranted in order to prevent students with disabilities from being denied an education because of their disabilities. By

ignoring the causal relationship between the disability and the misconduct, however, the encroachment is greatly expanded and becomes largely unjustified. In support of its argument against such an expansion of the IDEA, the school district sets forth an effective, though perhaps overly simplistic, hypothetical. In the hypothetical, a student is apprehended for possessing drugs in school, and subsequently recommended for expulsion. Under normal circumstances, this student could be expelled, and his right to educational services from the school district would cease.

However, suppose that this student has a minor speech irregularity for which he receives 30 minutes per week of speech therapy. The student would then be classified as handicapped under the IDEA, even though in every respect other than the receipt of speech therapy, his school program would be identical to that of his non-disabled peers. Following an MDC, it is determined that the student's drug possession was unrelated to his speech irregularity, and the school district determines to expel him.

Solely because this student possesses a disability, minor as it may seem, the plaintiffs would impose upon the school district an obligation to continue educating him. This is so, even though the same student, absent the minor disability, would be expelled and denied further services. The disabled student would effectively be entitled to an unlimited exemption from any such punishments. Such an occurrence is not only patently unfair to students with no disabilities who are treated more harshly, but it likewise teaches the wrong lesson to students with unrelated disabilities who receive a "blank check" to behave in any manner they select. From the

standpoint of the school district, it is further unjust to require the expenditure of already strained resources to provide an education to a disabled student who is sanctioned for conduct not linked to any disability.

The law requires the state to have in effect policies which ensure all children with disabilities the right to a free and appropriate education. See 20 U.S.C. § 1412(1). That is not to say, however, that a child with a disability cannot act in such a manner which would forfeit that right. John Doe was admittedly aware of the school's strict policies regarding the possession of controlled substances on school premises. Still, John Doe brought a bag of marijuana to a school dance. Armed with an independent determination that such actions were not related to Doe's disability, the Board expelled Doe for the remainder of the semester and ceased providing educational services. By his actions, Doe forfeited his right to a "free and appropriate education." Given the extent of Doe's disability and the nature of his actions, it was not improper for the Board to hold Doe accountable.

The issue of whether or not Doe's placement should have been stayed pending the outcome of the due process hearings is a bit more troubling. For many of the same reasons discussed above, however, we do not believe that the school district is required to bear this burden where the student's conduct is unrelated to his disability. Absent a relationship between disability and misconduct, the school district is not required to discipline the student with a disability any differently than it would the non-disabled student. Following expulsion, the non-disabled student is entitled to receive no services unless he can persuade a court to issue an injunction so requiring. In the present case, no such injunction was sought.

The plaintiffs argue that the "stay-put" provisions of the IDEA and other regulations precluded the school district from denying Doe services pending his appeal. Section 1415(e)(3) of the IDEA does provide that a child "shall remain in the then current educational placement of such child" during the pendency of any proceedings. 20 U.S.C. § 1415(e)(3). However, such a provision does not expressly apply to stay expulsion where the student's misconduct is unrelated to his disability. Once the school district has properly determined that the student's misconduct is unrelated to his disability, the school district may treat the case as any other—and it may cease providing educational services, as would be its right in any other case. See *Doe v. Maher*, 793 F.2d 1470, 1482 (9th Cir. 1986), aff'd as modified, *Honig v. Doe*, 484 U.S. 305 (1988). The student whose misconduct is unrelated to his disability is entitled to no more.

We recognize that the cessation of educational services in a student with disabilities can have a significant impact on the future progress of that student. This recognition, however, does not lessen the importance of a causal connection and how such a connection may affect the school district's actions. Where the misconduct is caused by the student's disability, the student's placement is more often sufficiently restrictive (e.g., a self-contained classroom) so that additional monitoring and managing of the student's behavior can be effectuated with minimal changes in staffing and cost. In such a case, the cessation of educational services would not be (and should not be) permitted. However, in cases where the misconduct is unrelated to the student's disability, it is more often the case that a relatively minor disability is present, and the special services provided to the

student are fairly minimal. In these less restrictive placements or programs, the options for managing the student who is intent on misconduct are limited and costly. Without the option of expulsion, the school would have little ability to control such a student. Doe, who had been mainstreamed at OPRF, no doubt belongs in this latter category.

Accordingly, where a student with a disability engages in misconduct which is found to be unrelated to that disability, the school district is entitled to treat that student as if he had no disability. This is so even where the disabled student faces expulsion and the cessation of educational services. The plaintiff's motion for summary judgment is denied.

B. Counter-Claim: The Due Process Hearings

Following the expulsion of Doe, Doe's parents filed a due process request seeking that Doe's expulsion be rescinded. The Does maintained that the school district's determination to the effect that Doe's conduct was unrelated to his disability was inadequate. Two hearings were subsequently conducted. The "Level I" hearing officer upheld the Board's actions. The "Level II" hearing officer reversed. The defendants now seek review of the "Level II" decision via a counter-claim before this court. Both parties have moved for summary judgment.

In an action challenging a special education decision, section 1415(e)(2) of IDEA provides:

> [T]he court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party and basing its decision on the

> preponderance of the evidence shall grant such relief as the court determines is appropriate.

20 U.S.C. § 1415(e)(2). Federal courts have interpreted this section to mean that judicial review is not held to the highly deferential standard of review established in other agency actions. *Ojai Unified School District v. Jackson*, 4 F.3d 1467, 1471 (9th Cir. 1993). Rather, district courts conduct a de novo review, while affording "due weight" to the administrative decision. The amount of deference a district court gives to the administrative decision is a matter of judicial discretion. *Gregory K. v. Longview School District*, 811 F.2d 1307, 1311 (9th Cir. 1987). However, findings of fact made in a regular manner and with evidentiary support are entitled to presumptive validity. *Doyle v. Arlington County School Board*, 953 F.2d 100, 105 (4th Cir. 1991)

Whether or not the school board had adequately evaluated the extent of Doe's disability and its possible connection with Doe's misconduct on September 9, 1994 provided the focus of the two hearings. In this regard, the plaintiffs note several alleged shortcomings of the Board, including the absence of ten days notice prior to the convening of the MDC, the quality of information available at the MDC, and the Board's refusal to evaluate Doe for ADHD and ADD prior to his expulsion.[2] The Level I hearing officer and the Level II hearing officer markedly disagree as to the significance of each of these matters,

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[2] The plaintiffs' also assert that the school district did not adequately contact them once the semester expulsion was over. Although the school district presents evidence to the contrary, Doe had already been placed in a different school with no apparent plans to return to OPRF.

choosing to focus on different aspects of the testimony and record. Having independently reviewed the record, we find that, while the school district may not have been overly accommodating to the Does and their requests, the district did possess adequate information with which to evaluate Doe at the September 19, 1994 MDC.

At the September 19, 1994 MDC, the staff reviewed Doe's goals and determined that the learning disability resource room and support services which had been recommended for Doe at his February 16, 1994 MDC and then eliminated at Mrs. Doe's request should be reinstated. The plaintiffs would argue that this reinstatement is indicative of the staff finding Doe's placement at OPRF to be inappropriate. However, given that it was Mrs. Doe who requested that these special services be discontinued and that these precise measures had first been recommended in February 1994 at the MDC held in preparation for Doe's transition into high school, we disagree.

The plaintiffs devote a significant amount of energy in arguing that Doe should have been evaluated for ADD or ADHD. At the September MDC, the plaintiffs' attorney requested that Doe be evaluated for ADD. According to the plaintiffs, the MDC staff's failure to so evaluate or consider Doe's case in light of such a possibility, i.e., that Doe might have ADD or ADHD, violated Doe's rights.

At both due process hearings, the plaintiffs attempt to elicit testimony as to Doe's alleged ADD or ADHD. Several individuals testified, each of whom, the plaintiffs claim, suggests that Doe has ADD or ADHD. Whether or not Doe has ADD or ADHD (and the parties vigorously dispute this), however, is not the issue. If, for example,

the presence of ADD or ADHD under the circumstances would have had little impact on the MDC staff's decision as to the relationship between Doe's misconduct on September 9, 1994 and his disabilities, then no rights would have been violated. If, however, such a diagnosis would have clearly influenced the MDC staff's decision, the outcome changes.

Although the plaintiffs maintain that several members of the staff indicated a desire to have more information, the MDC staff nevertheless unanimously determined that Doe's conduct was unrelated to his disability. In forming this decision, the staff relied upon, inter alia, a series of annual MDC's and accompanying evaluations dating back to 1988, as well as an evaluation by the OPRF psychologist. Notably, at no time prior to the September 19, 1994 MDC was the possibility of ADD or ADHD ever mentioned by the Does, former teachers, or past MDC reports. This is significant, especially given that such disorders customarily manifest during the grade school years. Given the absence of several of the more prevalent signs, the MDC staff thus had some basis for finding the attorney's request for an ADD evaluation to be somewhat suspect.

The evidence presented by the plaintiffs at the hearings is likewise uncertain as to whether Doe's act of bringing marijuana to school related to his disability—ADD, ADHD, or otherwise. There was testimony by the Doe's psychologist, for example, to the effect that Doe's conduct reflected a sense of low self-esteem, thus compelling Doe to act in such a way which would make him look "cool" to impress his peers. Indeed, this was offered as an explanation for Doe's behavior on September 9, 1994, the presence of ADD or ADHD notwithstanding.

The Does' psychologist did testify that Doe exhibited behavioral traits indicating ADHD. As such, Doe lacked a sense of impulse control. However, the psychologist also stressed that Doe did not exhibit any problems with inhibitory control. Based on Doe's behavioral history and scholastic achievement, Doe's psychologist believed that Doe could behave spontaneously, impulsively, and without being aware of the consequences of his actions. However, Doe knew fully the difference between right and wrong. Doe could have excellent control of his behavior when he understood the consequences of his actions.

The day of the school dance, Doe admits to having been present while the OPRF rules of conduct were being explained to the students. Doe had received a copy of school regulations at home and had been instructed as to OPRF's drug policies as a member of the soccer team. Moreover, Doe had the marijuana for at least a day prior to the dance, and the circumstances of the day further indicate a conscious decision to bring the marijuana to the school dance. Doe's conduct on September 9, 1994 was not spontaneous. To the contrary, the nature and circumstances surrounding Doe's actions indicate that they were quite deliberate.

Even assuming the presence of ADD or ADHD, there is little support in the record that Doe's actions related to any of his disabilities. There is moreover little support that the presence of ADD or ADHD under the circumstances would have significantly altered the findings of the MDC or that the Does were in any way prejudiced by the swiftness with which the MDC was held. We do not deny that the defendants exhibit minimalist tendencies where due process is concerned. Nevertheless, we are hesitant to tread into the area of school discipline absent

flagrant inequities. If the conduct of the school district reasonably protected the rights of the student and the district's actions were reasonably informed, our inquiry must end.

John Doe was a mainstreamed special education student who was just starting high school. In an effort to nurse a sense of low self-esteem and to gain the approval of his peers, John Doe brought a bag of marijuana to a school dance. An MDC determined that this action was not related to Doe's disabilities. As such, John Doe was subject to expulsion. Whether the punishment given actually fit the crime is not for this court to decide. The Level I hearing officer heard testimony and determined that the school district had proceeded appropriately under the circumstances. The Level II hearing officer reversed, and in so doing, became entwined in certain factual contentions which were not properly dispositive. Because we ultimately agree with the conclusion of the Level I hearing, we grant summary judgment as to the defendants' counter-claim. The plaintiffs' cross-motion as to the counter-claim is denied.

CONCLUSION

For the reasons set forth above, the plaintiffs' motion for summary judgment as to Count VIII of the complaint is denied. The plaintiffs' motion for summary judgment as to the counter-claim is likewise denied. The defendants' motion for summary judgment as to the counter-claim is granted.

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July 25, 1995

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ORDER
LEVEL II APPEAL OF P.NO. 95-001

I. PROCEEDINGS

A Level I Due Process Hearing was held on November 28, 1994, before Francis W. Nowik. A Level II Due Process Hearing was requested by Notice dated January 11, 1995. By agreement, hearings were held on March

13, 1995 and April 10, 1995. The reason that a second hearing was held was that one of the parties requested rebuttal witnesses. Oral argument was held after the rebuttal witnesses were heard on the date of the second hearing. The parties requested the filing of simultaneous briefs and by agreement they were received by the Level II hearing officer. The briefs were voluminous, as well as the supporting documents exceeding 200 pages. They were received in May, 1995.

II. BACKGROUND

The student was expelled from the school, and as a result of such expulsion was denied ancillary or alternative services. This occurred in September, 1995. The reason given for the expulsion was the passing out of marijuana at a school function. This normally under school rules would be a cause for expulsion at the sole discretion of the school authorities. The Complaint states that the school authorities did not give weight to the child's LD nor had they properly determined whether or not the child had ADHD.

There is a dispute whether various MDC were timely and within the framework of the law. There are disputes whether or not the MDC especially the one in connection with the expulsion in September, 1995 considered appropriate material. It would seem to me that the original MDC was not timely in that the September, 1994 MDC did not consider appropriate material including the material concerning ADHD. In fact, Dr. DeRose-Ihrig, a school psychologist noted the need for reevaluation and an ADHD evaluation but the team indicated they based their decision only on information before them. There

was no current evaluation of a child. Others noted, including the school psychologist, that a determination that the child had ADHD would likely impact on their decision as it his behaviors relatedness to his disability. It should be noted that the School District also took the position that no ADHD evaluation could be made without a MD being one of the persons who made the diagnosis. This conclusion is completely unsupported as far as I can determine by either case law, statute or regulations. Granted, that an MD is necessary to prescribe drugs if appropriate for the condition and of course must concur as to the drug and the dosage but he is not essential to the initial diagnostic process.

Subsequent handling of the situation including the failure to notify the parents of the commencement of the second semester compounded the problems. The undoubted caseload and lack of sufficient staffing may have precluded giving the individual cases the attention necessary. The lack of the MDC and IEP precluded the child returning to public school for the second semester.

As to the ancillary or alternative services it is interesting to note that if the child in question had been expelled from a non-public school he would still be entitled under law to the ancillary or alternative services. These services were not made available to the child as a result of the expulsion. This is contrary to both the wording and intent or the law that said services should be available to all children of school no matter where they go to school.

III. FINDINGS OF FACT

1. The student was not properly evaluated upon entering high school.

2. The student was not re-evaluated even though the school psychologist noted such need in the February, 1994 MDC which recommended an ADHD evaluation.

3. On Friday, September 9, 1994, P was accused of being in possession of a small quantity of marijuana at a school dance. P was immediately suspended for ten school days and recommended for expulsion. Parent's Level I documents, Correspondence, p.4) Parents were "invited" on-September 13, 1994 to attend a conference on September 16 (later changed to September 19, 1994) to "Review your child's eligibility and needs for special education and related services (MDC). Review your child's Individualized Education Program (IEP) progress and determine future IEP and educational placement needs." (Parent's Level I documents IEP/MDC, p.20.)

4. On September 19, 1994, the MDC convened. (Parents Level I documents, MDC/IEP, p.2.) Notably, only the school psychologist had ever spoken with P or reviewed his school record. She had spoken to him on only one occasion, for approximately one hour. None of P 's current teachers or former service providers from Roosevelt Junior High were in attendance. (ID; Level I transcript, pp. 74-75, 79-80, 328-29).

5. Although Dr. DeRose-Ihrig noted the need for reevaluation and an ADHD evaluation, the school district refused Parent's request to provide P with those evaluations prior to determining whether P 's behavior was related to or resulted from his disability. Instead, the team was told they must base their decision only on the information before them. Because there was no current evaluation on P , the team based their decision on whether P 's behavior was related to his IEP goals and

objectives. (Level I transcript, pp. 72-74, 300-303; Parent's Level I documents, MDC/IEP, p.17).

6. The school psychologist and the others noted that a determination that P had ADHD would likely impact upon their decision as to his behavior's relatedness to his disability. However, Parent's request for ADHD evaluation at district expense was denied. (Level I, transcript pp. 109; 303-04). Likewise, parent's request that the team defer its decision until Parents obtained an evaluation at their own expense was denied. (Level I transcript, pp. 109-110).

7. Each team member expressed discomfort with making this decision only upon the information available. (Parents Level I documents, MDC/IEP, p.17; Level I transcript pp. 71-73, 300-303) Team members also acknowledged that a diagnosis of ADHD might well impact their decision. (Level I transcript, pp 71-73, 300-306). At no time did the team consider the educational impact of P 's impending expulsion. (Level II transcript, April 10, 1995, p. 23.) Nonetheless, the team concluded that P 's behavior was not related to his disability and that the school could proceed with the expulsion recommendation. (Parents' Level I documents, MDC/IEP, p. 17.)

OPRF H.S. Board Rule 51,4 which specifies that:

> If the determination of the M.D.C. is that the misconduct is a result of the student's handicap or that the placement is inappropriate the student shall not be expelled from school.

(See Parents Level I documents, Correspondence, p. 11; see also Level I, transcript, pp. 69-70).

8. Although the team also found that P 's current placement was inappropriate (Parents' level I documents,

MDC/IEP, p.1.) P was expelled for the remainder of the school term (OPRF October 14, 1994 for Prehearing Order, ¶6)

9. Parents immediately filed a due process request (Parents' Level I documents, Correspondence, p.2; Level II transcript, March 13, 1995, p. 77). The school district refused to stay P 's placement and likewise refused to offer alternative services to P during the period of his expulsion. (Level II transcript, March 13, 1995, p. 77).

10. In November, 1994 a Level I due process hearing was held in this matter. At the hearing Dr. John Meade, a state certified psychologist, testified that he had conducted an evaluation for P at the request of P 's pediatrician, Dr. James Kiley. (Level I transcript, pp. 241-42). Dr. Meade testified as an expert for parents that he had evaluated P of ADHD and in his opinion, P suffered from ADHD. (Level I transcript, pp. 254-258) A copy of his evaluation was entered of record. (Parent's Level I Hearing Exh. 1) He further opined that P 's behavior in bringing the marijuana to school was related to and resulted form his disabilities, ADHD and low self-esteem. (Level I transcript, pp. 258-260).

11. Ms. Kathy Fouks, principal for Acacia academy (P 's private placement paid for by parents), also testified as an expert on Parent's behalf. She testified that P 's alleged behavior was clearly related to his disability. She further testified that P needed an O.T./P.T. evaluation and central auditory evaluation. (Level I transcript, pp. 156-158, 166-167, 172-174, 177-179, 189, 191.)

12. Both experts also testified that P 's reading, written expression and math ability were several years below grade level through this I.Q. was average. They both

recommended that P receive intense remedial academic and social support if he was ever to achieve near grade level. (Level I transcript, pp. 147-154, 244-255).

13. The school district did not offer any contrary expert opinion on wither P was ADHD or whether his alleged behavior was related to his disability. In fact, the school district psychologist agreed that P 's history suggested ADD or ADHD and that such a diagnosis would impact her opinion as to whether his alleged behavior was related to his disability. (Level I transcript, p. 303).

14. Although Parents' due process request raised seventeen different issues related to violations of P 's and parents rights by school district, the hearing officer failed to make any specific findings on any of those issues. Instead the hearing officer summarily held that OPRF's expulsion of P was proper and was not a violation of P 's or parent's rights.

15. On January 11, 1995, Parents filed a Level II request for review. That request contended that the Level I decision was legally and factually erroneous in its entirety.

16. Following the Level I hearing, the district did not convene an MDC to consider the results and recommendations of Dr. Meade's independent evaluation tendered at the Level I hearing. However, in response to Parent's January 25, 1995 request, the school district convened on MDC on February 27, 1995 to consider P 's independent evaluations. (Parents' Level II additional hearing documents, p. 001) The school psychologist, Dr. DeRose-Ihrig testified that prior to the MDC she had never seen Dr. Meade's report. (Level II transcript, April 10, 1995, pp.708).

17. Although the spring semester at OPRF had begun in January, 1995, prior to the MDC, the school made no contact with parents to convene an IEP for Spring 1995 or to translation P back into OPRF. Parents were not even advised when the second semester started. In fact at the MDC parents were told they must re-enroll P into OPRF. (Level II transcript, March 13, 1995, p. 75-77).

18. Page 5 of the Spring 1995 MDC states "P has a learning disability per Psycho.Ed. and acceptance of this report by Dr. DeRose-Ihrig." (Parents Level II Additional Hearing Documents p.005) The MDC also calls for an OT/Pt evaluation, investigation into a central auditory evaluation and updated social developmental study. Significantly, although the in-depth Psychoeducational Evaluation from the Achievement Center finds at pg. 9 (Parent's Level II Additional Evidence) that P is ADHD and the MDC specified that rendering of certain services related to ADHD, the school district refused to acknowledge this diagnosis. (See, e.g., Level II transcript, March 13, 1995, p. 90.) The school district relies upon the absence of a medical diagnosis for ADHD to support their position. However, on March 10, 1995 the school district was supplied with a copy of P 's RX for Ritilian along with a statement from P 's pediatrician that in his opinion, P suffers from ADHD. P 's March 10, 1995 evidence submitted to counsel for OPRF by FAX and entered of record at Level II hearing.) OPRF still refuses to acknowledge P 's ADHD diagnosis. (See, e.g., Level II transcript, April 10, 1995, p. 19-21).

20. At the spring 1995 MDC, parents' request for a progressive discipline policy to accommodate P 's low self esteem and ADHD was refused. Parents were told that P would simply have to learn that certain behavior

would ultimately lead to expulsion. (Level II transcript, April 10, 1995, p. 41-43). The MDC calls for the provision of direct social work and psychological services to address P 's significantly low self-esteem. (Parent's Level II Additional Hearing Documents, p.001).

21. Finally, the team recommended that P become involved in sports or other extra curricular activities now as part of a transition back to OPRF as well as to partially address his low self esteem. (ID.) However, Parent's subsequent phone calls to enroll P in such programs have gone unanswered. (Level II transcript, March 13, 1995, p. 76).

22. At the Level II hearing, additional testimony and documents were produced by both sides. Ms. Kathy Fouks testified that she headed an MDC team at P 's private placement to consider Dr. Meade's evaluation as well as an evaluation performed at the school. That MDC team concluded that P was Dyslexic, significantly behind in achievement and ADHD. The team also recommended further OT/PT evaluations, direct psychological services, social work services and an inclusion facilitator. Ms. Fouks also testified that P 's expulsion had been educationally and emotionally disastrous for him (Level II transcript, March 13, 1995, pp. 16-17, 22-24).

23. OPRF argues that this is a case about whether or not a school district may expel a student for possession of marijuana at a school function. (see, e.g. Level I transcript, p. 345, 347.) Parents argue that this is a case about the rights of a special education student, when the school proposes a significant change in that student's placement (ie: expulsion). Parents are correct.

IV. CONCLUSIONS OF LAW

1. The Level I hearing Officer erroneously found that P was not entitled to alternative services during the period of his expulsion.

2. The Level I Hearing Officer erroneously found that affording parents less than ten days to obtain an independent evaluation was not a violation of P 's or parents, rights.

3. The Level I Hearing Officer erroneously found that failure to comply with the Section 226.590 "stay put" requirements did not violate P 's or Parent's rights.

4. The Level I hearing Officer erroneously found that the District's refusal to evaluate P for ADHD was not a violation of his or parent's rights.

5. The Level I Hearing Officer erroneously failed to make any finding or parents request for reimbursement for their independent evaluation. There is no request that ADHD must be diagnosed by an MD.

6. The Level I Hearing Officer erroneously found that the District's uncontested failure to appropriately evaluate and place was not a violation of P 's or parents' rights.

7. The Level I Hearing Officer erroneously found that the District's failure to appropriately evaluate and service P Prior to recommending a significant change in placement did not violate P 's or parents rights.

V. ORDER

Accordingly, I hold the Level I decision is hereby reversed and the school district's refusal to stay P 's place-

ment or provide alternative educational services as well as its failure to base its placement decisions on current, adequate alternative data entitles Parents to the following relief:

1. the district to expunge all record of the expulsion from P 's permanent record;

2. the district is to reimburse Parents for the cost of P 's alternative education for this school year;

3. the district is to reimburse Parents for the cost of P 's independent evaluations;

4. the district is to outline a progressive discipline policy in P 's IEP to address behaviors related to P 's disability as identified by Parent's experts;

5. the district is to reevaluate in accordance with this opinion as to the child's ADHD;

6. the district is to complete and staff for all evaluations called for in P 's February 29, 1995 MDC prior to September, 1995;

7. finally, I order that given the school district's refusal to stay or provide any alternative educational placement for P , his placement has been appropriately stayed at Acacia Academy during the pendency of this review and the cost of that placement shall be borne by the school district.

VI. INSTRUCTIONS FOR APPEAL

Any party aggrieved by the reviewing officer's decision may bring a civil action in any court or competent jurisdiction within 120 days after the date of the mailing of this decision.

Entered: July 25, 1995

JOSEPH O. KOSTNER
Level II Hearing Officer

NOTE: Subsequent to the receipt of the briefs, on three separate occasions, the attorney for [John Doe] attempted to file additional documents without asking leave of the hearing officer to allow them to be filed and without an opportunity for the attorney for the School District to object. These documents improperly sent to the hearing officer without the foregoing appropriate procedures were not taken into account by the hearing officer but also the hearing officer did not penalize the student for this improper and unprofessional activity.

LEVEL I IMPARTIAL DUE PROCESS
HEARING DECISION

STUDENT: P.
REQUESTING PARTY: Mr. & Mrs.
RESPONDING PARTY: Oak Park River Forest High School
HEARING OFFICER: Francis J. Nowik
DATE OF HEARING: November 28, 1994
DATE OF DECISION: December 12, 1994

WITNESSES FOR REQUESTING PARTY:

Mother
Kathy Folks Principal, Acacia Achievement Center

Dr. John Douglas Mead Pediatric Psychologist, Rush Presbyterian St. Luke's Hospital

Jeannine DeRose-Ihrig School Psychologist

WITNESSES FOR RESPONDING PARTY:

Patricia Palmer Division Head Special Education O.P.R.F. High School

Susan Casey Assistant Superintendent for Special Education, O.P.R.F. High School

ATTORNEY FOR REQUESTING PARTY:
Susan Einspar-Wayne

ATTORNEYS FOR RESPONDING PARTY:
John A. Relias

At approximately 9:35 on Monday, November 28, 1994, the Level I Impartial Due Process Hearing was convened on behalf of P hereinafter referred to as P. The Level I Hearing Officer has jurisdiction to hear and decide this matter under 105 ILCS 5/14-8.02(9),34 CFR 300.506-509 of the PL 94-142 regulations (IDEA) and 23 Illinois Administrative Code 226 Subpart J.

The parties were informed of their rights and responsibilities under Section 14-8.02(g) of the School Code of Illinois, 34 CFR 300.508 of the PL 94-142 regulations and 23 Illinois Administrative Code Subpart J.

SUMMARY OF THE ISSUES IN DISPUTE: The parents contend that the expulsion of their son for possession of marijuana at a school dance was improper. They contend that the district; 1) failed to provide the parents with a reasonable opportunity to obtain an independent evaluation prior to the change in placement; 2) failed to provide parents with an independent evaluation at District's expense; 3) refused to provide their son with an evaluation for A.D.H.D. 4) failed to provide a re-evaluation prior to recommending a change in placement; 5) failed to provide the services delineated in the Fall 1994 I.E.P.; 6) failed to consider their son as "otherwise health impaired pursuant to the Americans With Disabilities Act and evaluate or allow the parents to evaluate and provide appropriate services; 7) failed to properly evaluate or provide appropriate placement; 8) failed to provide proper custodial care of their son's records and protect his anonymity and other students; 9) failed to properly monitor their son's interim placement or request an IEP be convened to consider appropriate changes in placement; 9) failed to rescind an expulsion recommendation

despite a significant change in their son's placement in violation of District rules and regulations.

The central issue is whether the District acted appropriately in expelling P, a LD student, for possession of marijuana at a school function? Was P's conduct related to his handicapping disability? Were the proper procedures followed by the School District?

Prior to the hearing the counsel for the School District submitted a motion requesting the Hearing Officer to enter an order determining that the stay-put provision of the IDEA does not apply in this case and that the School District may continue in its expulsion of P. The counsel for the parents responded with a memorandum presenting arguments supporting the denial of the School District's motion. The Hearing Officer ruled that he would proceed to hear the case since the School District's motion contained a number of alleged facts that were challenged by the counsel for the parents.

The Hearing Officer also ruled that the only issue as it relates to the expulsion that will be considered at the hearing is the relationship between P's conduct that resulted in the expulsion and his handicapping disability.

FINDINGS OF FACTS

P was a freshman at the district high school. He was identified as a handicapped student, learning disabled, under IDEA, he has a learning disability that affects his organization abilities. On September 9, 1994, he attended a school sponsored dance on school premises. He was observed taking something out of his pocket and displaying it to other students at the dance. He was confronted

by school personnel and it was discovered that he was in possession of marijuana. P was immediately suspended for ten (10) school days. During that period of time, he was not provided with any educational services. A discipline hearing was held on September 16, 1994, regarding the incident. On September 19, 1994, a multi-disciplinary staffing was held and it was determined that the misconduct, possession of marijuana, was neither related to or caused by his handicapping condition. The Board of Education on September 22, 1994 expelled P from school for the first semester of the 1994/95 academic year. The District has not provided P with any educational services since that time.

On September 23, 1994, the attorney for the parents filed a Level I Due Process Hearing request, contesting P's expulsion and citing Section 1415(e)(3), the stay-put provision.

The record indicates that in September of 1988, when P was a seven year old third grader, he was referred for a case study evaluation. The IEP developed recommended that P needed less than 50% time in Resource Room for services in reading and visual perception. In June of 1989, the annual review recommended continued services in the LDR classroom for word analysis deficits. In June of 1990 at the IEP conference P was identified as having a mild learning disability and concluded that P would be full time in the regular classroom except for support services as needed in language arts and reading.

At the March 1991 IEP conference to determine the educational needs of P for 1991/92, P was identified as having a learning disability, he was mainstreamed in all academic areas with collaborative services. In January

1992, MDC re-evaluated P and concluded he had a learning disability and placed in a regular classroom with consultative services to work to improve organization and study skills. At the January of 1993, MDC/IEP conference, P was identified as learning disabled in written expression & spelling: He was to work on organization skills and resource services would be made available to him. On February 16, 1994, an MDC/IEP conference was held in preparation for P entering high school, it was recommended that P be provided with the services of the LD support services on social work. It was noted that the LD support services would be withheld pending review 11/94 or 12/94 after the first 9 weeks of school. P's mother wanted Biology included in his class schedule and elimination of the LD resource room for the first nine weeks.

At the September 19, 1994, MDC/IEP conference P's goals were reviewed and it was determined that they should be continued. P was eligible for LD room and support services. The LD resource room that was eliminated at the parents request from the previous IEP was reinstated. This change is not significant under these circumstances. The parent and their attorney attended the conference and there is nothing in the record that indicates that they were in an way prejudiced by not receiving at least ten days notice. The parents' attorney requested that P be evaluated for ADD. At the conference, notes from the Disciplinary Hearing of 9/16/94 were shared with those in attendance. The staff was unanimous in their decision that P's conduct was unrelated to his disability. Some of the staff members did express a desire for more information. Based on the series of MDC/IEP available to them, their actions to proceed to make their decision was appropriate.

There was testimony that P's conduct at times reflects a low self esteem, thus he will do something to look "cool" i.e. impress his peers. This was offered as an explanation for his possession and showing the bag of marijuana at the school dance. The psychologist testified that P has exhibited behavioral traits indicating ADHD and as such lacked impulse control. The cognitive profile developed by the psychologist did not confirm any problem with inhibitory control. The psychologist, based on P's behavioral history and scholastic achievement, believed that P would behave spontaneously, impulsively, without being aware of the consequences of his action, but would have excellent control of his behavior when he understood the consequences of his action. P does know the difference between right and wrong. I find that P did not act on impulse or spontaneously in this matter. He had the marijuana for at least a day and had planned to bring it to school dance. This was not a spontaneous act.

P participated in a sport where the use of illegal substances was prohibited. Copies of those regulations were given to him and his parents and acknowledged on by P and his parents. In addition, on the morning of the September 9, 1994, the rules of School District conduct were reviewed and P admitted to a school administrator that he was there at the time the rules of conduct were explained. I find that P had every reason to know the serious consequences of his conduct regarding the possession of marijuana.

The records indicates that the social worker did make several attempts to contact P during the two weeks school was in session.

CONCLUSIONS OF LAW

IDEA state at 20 USC 1415(e) (3):

> "During the pendency of any proceedings conducted pursuant to this section, unless the state or local agency and the parents or guardian otherwise agree, the child shall remain in the current educational placement of such child . . . until all such proceedings have been completed."

The expulsion of P constituted a change in P's Placement. Doe v. Maher, 793 F. 2d 1470, 1482 (9th Cir.1986), affirmed as modified. Honig v. Doe, 487 U.S. 305, 108 S.Ct. 592 (1988).

The expulsion of a special education student is governed by 23 IAC 226.40 b) which states:

> A child who has been determined eligible for a special education instruction or resource program or related service shall not be expelled for behavior or a condition which is, or results from, an exceptional characteristic as defined in the The School Code (Ill. Rev. Stat.1989, ch. 122, pars. 14-102 and 14-103a) and this Part.

Based upon the evidence presented, P's conduct in possessing marijuana at a school dance was not related to his handicapping condition. P's behavior in bringing marijuana to the dance to impress his peers is not different than the motivation that exists for those without disabilities. P knew right from wrong and this was not a spontaneous act. He had the material for at least the day before bringing it to the dance that evening. The court in Doe v. Maher page 1480 footnote stated in regard to defining if a handicap significantly impairs the child behavioral controls:

> . . . although this definition may, depending on the circumstances, include conduct of handicapped children who possess the raw capacity to conform their behavior to prescribed standards, it does not embrace conduct that bears only an attenuated relationship to the child's handicap. An example of such attenuated conduct would be a case where a child's physical handicap results in his loss of self-esteem, and the child consciously misbehaves in order to gain attention, or win approval, of his peers. Although such a scenario may be common among handicapped children, it is no less common among children suffering from low self esteem for other, equally tragic reasons."

Once it is determined that the conduct of the handicapped student is not related to the handicapping condition, the student is subject to the same discipline as any other student, to do other wise would be to convert a shield into a sword. By being a student receiving special education services, IDEA insures that those services are not changed without appropriate procedures related to those special education services. IDEA also makes clear that special education student can be expelled when the conduct is unrelated to the handicapping condition. By bringing marijuana to a school function, P was potentially endangering not only himself but other students as well. Once the MDC determined that P's conduct was not related to his disability, P was subject to the same rules and regulations as any non-disabled student.

The School District followed its procedures in dealing with this kind of offense. In balancing the rights of P under I.D.E.A. and the harm that can come to the student population of the District, considering all the facts of the case, the District acted appropriately.

ORDER

1. That the District did not violate P's rights and the expulsion of P was appropriate under the circumstances; the District is under no obligation to provide any educational services.

APPEAL INSTRUCTIONS

You may request a verbatim transcript of the hearing.

If either party disagrees with this decision, they may, within thirty (30) days of receipt of the decision, appeal to the Illinois State Board of Education, Legal Department W-475, 100 North First Street, Springfield, Illinois 62777-1111, Attention Jeannie Schulze. The appeal may be filed by mail or in person and must include the following:

1. a statement that the appeal of a Level 1 decision is being requested;

2. a statement setting forth the portions of the Level 1 decision with which the party disagrees;

3. a statement setting forth the reasons why the decision should be changed:

4. a statement of the relief requested;

5. a statement requesting oral argument, if desired:

NOTE: A new hearing is not required. A hearing will only be convened if specifically requested by a party and only for the purpose of receiving additional evidence or oral argument.

6. a statement indicating that a copy of the request for the appeal has been served on the other party:

7. the name, address and telephone number of both parties to the Level 1 hearing.

Within ten (10) days of filing an appeal, or within ten (10) days of the receipt of the notice of an appeal, the school district shall transmit to the State Board of Education, Legal Department, in Springfield, a complete

administrative record of the hearing including transcript, records, and reports presented at the hearing, other exhibits and materials presented, and a copy of the Level 1 decision. The district shall simultaneously send a complete administrative record to the parents.

FRANCIS J. NOWIK
Level 1 Impartial
Due Process Hearing Officer

_____
Signature of Level 1
Hearing Officer

DATE: 12/12/94

cc: Illinois State Board of Education

SENATE COMMITTEE REPORT, Individuals with Disabilities Education Act Amendments of 1997 (Selected Portions)

The committee views the structure and substance of this legislation as critically important, if the country is to see clearer understanding of, and better implementation and fuller compliance with, the requirements of IDEA.

TITLE I—AMENDMENTS TO THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Amendments to part B of the Individuals with Disabilities Education Act

State Eligibility

Section 612 establishes the conditions of State eligibility for part B funds. Many provisions are retained from current law. Other provisions have been added to promote a better understanding of, and a more consistent compliance with, part B of the statute.

Provisions retained from current law are obligations of a State to: establish a full educational opportunity goal and a timetable for meeting it; comply with the evaluation and confidentiality, IEP, and procedural safeguards provisions; require that private placements made by public agencies meet State standards; not commingle part B funds with State funds; seek public comment prior to adopting policies and procedures necessary to comply with this section; and meet LEA eligibility requirements is the SEA provides direct services. In addi-

tion, section 612 retains the opportunity of a State to apply for a waiver from the 'supplement not supplant' provision, when it can demonstrate, through clear and convincing evidence, that it is providing a free appropriate public education to all children with disabilities in the State.

Section 612 contains clarifications of current law. To receive part B funds, States are to make available a free appropriate public education to all children with disabilities, including children with disabilities who have been suspended or expelled from school. States must also conduct child find activities, which include identification of children in private schools and a process to determine which children are in need of special education and receiving it (while allowing identified children not to be labeled with a disability category).

Section 612 contains several new provisions. It requires a State to establish performance goals for children with disabilities and to develop indicators to judge such children's progress. Any State that has a state improvement plan under Part D must revise it based on information it obtains from the assessment of such progress. It requires that children with disabilities participate in State and district wide assessments of student progress, with or without accommodations as appropriate for the child. By July 1, 2000, for children who cannot participate in such assessments, alternative assessments must be developed and conducted. The State must report to the public on the assessment performance of children with disabilities with the same frequency and detail it reports on the performance of nondisabled children, including the number participating in regular assess-

ments and the number participating in alternative assessments. Data related to children with disabilities must be disaggregated. Further, the section requires States to determine if there is a disproportionate number of long-term suspensions and expulsions of disabled children and if so to take appropriate action and to modify policies and procedures in order to be consistent with the act.

Evaluations, eligibility determinations, IEPs, and placements

The bill consolidates in Section 614 all interrelated provisions regarding the evaluation and reevaluation of children with disabilities and the development, review, and revision of individualized education programs (IEP's) for these children. Most of these provisions are current law, as it is expressed in statute, regulations, and other regulatory guidance and policies from the U.S. Department of Education. The committee anticipates that the consolidation of these provisions in one section, and the clarification of procedural and administrative requirements associated with them, will reduce the burdens imposed by the interpretations of current law and make the requirements more understandable. The committee expects that these particular amendments will facilitate State and local implementation of, and compliance with, these provisions.

. . . . . .

The bill's definition of the Individualized Education Program team includes the parents of a child with a disability; at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment); at least one special

education teacher, or where appropriate, at least one special education provider of such child; a representative of the local educational agency who is (a) qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (b) knowledgeable about the general curriculum; and (c) knowledgeable about the availability of resources of the local educational agency; an individual who can interpret the instructional implications of evaluation results, who may be a member of the team; at the discretion of the parent or agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and, whenever appropriate, the child with a disability. . . .

Procedural safeguards

The procedural safeguards in the I.D.E.A. have historically provided the foundation for ensuring access to a free appropriate public education for children with disabilities. Key to these due process procedures is the law's 'stay put' provision, which this bill retains. The committee has added clarifications to the procedural safeguard provisions to facilitate conflict resolution, describe how schools may discipline children with disabilities, and ensure that due process is useful for all parents and schools.

COMMITTEE REPORT—HOUSE REPORT 105-95, Individuals with Disabilities Education Act Amendments of 1997 (Selected Portions)

EXPLANATION OF AMENDMENTS

PURPOSE

The purposes of the Individuals with Disabilities Education Act Amendments of 1997 are to clarify and strengthen the Individuals with Disabilities Education Act (I.D.E.A.) by providing and educators with the tools to:

> Preserve the right of children with disabilities to a free appropriate public education;

INTRODUCTION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AMENDMENTS OF 1997 AND LEGISLATIVE ACTION

. . . . .

SUMMARY

. . . . .

Section 612 contains clarification of current law. To receive part B funds, States are to make available a free appropriate public education to all children with disabilities, including children with disabilities who have been suspended or expelled from school. . . .

AFFIDAVIT OF MARY DENISE CAHILL

Mary Denise Cahill, being first duly sworn, deposes on oath and states as follows:

1. I am one of the attorneys assisting in the preparation of the petition for certiorari in the case of *Doe v. Oak Park River Forest High School District*, No. 96-3014 (7th Cir.).

2. In order to gauge the impact which the decision of the District Court in this case may have had upon special education students in the state of Illinois, I made telephone inquiries to the Illinois State Board of Education.

3. I made an oral Freedom of Information Act request to Kathleen Joyce, who is employed in the Department of Funding and Reimbursement.

4. She confirmed that her department generates statistics regarding the numbers of students exiting special education services in the state each year and the reasons for their leaving, based upon self-reports by school districts. Pursuant to my request, Ms. Joyce transmitted 14 pages of statistics and a two page sheet detailing how school districts should categorize students exiting special education services in Illinois.

5. Attached hereto is a true and correct copy of an excerpt from the instructions to school districts, as to how to categorize the students who exit from special education in that district.

6. Using the instruction sheet to interpret the data, with Ms. Joyce's guidance, I observed that expelled students would be reported in category "L" as other, because there is no other category which describes them.

7. Between the 1995-96 and 1996-97 reporting periods, the number of students exiting special education in Illinois for "other " reasons jumped from 800 to 2159.

8. The first District Court opinion holding that a special education student could forfeit his right to an education by misconduct was issued in February, 1996.

9. This rise in students exiting special education services reported by the ISBE, coincides with our experiences and those of our colleagues which indicates that more special education students were expelled without continuation of services after the District Court's ruling than before. For example, in our office John Doe was the first such special education expulsion case I can recall. But since the District Court opinion was entered, we have represented at least three more such students.

/s/ Mary Denise Cahill
Mary Denise Cahill

Subscribed and sworn to
before me this 21st day of
September, 1997.

_____
Notary Public

Item 25: Reason for Exit

Enter the code listed below that most accurately describes the reason that an end date has been entered for the student. If Code A, B, C or D is entered, Item 26 must also be completed. **Note: Codes A, C and D are intended for high school age students only. Elementary districts may not use these codes.**

A. Graduated from high school with diploma. **Complete Item 26.**

B. Graduated from high school through certificate of completion/fulfillment of IEP requirements. **Complete Item 26.**

C. Reached maximum age for special education service, (i.e., the student reached the age of 21 prior to the beginning of the current school year. **Complete Item 26.**

D. Dropped out (age 16 or older only). **Complete Item 26.**

Item 26 is not completed for the following codes:

E. Deceased

F. Moved out of district: known to be enrolled in another district.

G. Moved out of district: unknown if enrolled in another district.

H. Went from an elementary district to a high school district.

I. Returned to regular education program full-time; no longer in need of special education services.

J. Withdrawn by parent from public school program and placed independently.

K. Placed in a Department of Rehabilitation Services school, a Department of Mental Health and Developmental Disabilities facility, or a Department of Corrections facility.

L. Other. Please attach to the form an explanation of the reason for exit for each student listed with Code L. This code should only be used when no other code listed is appropriate.

N. Refused service. This code should be used when special education services have been offered and refused by the parent or child.

P. Student record entered in error: never attended. A record entered for a student expected to enroll who never attended in the school district. This code is not valid for students who did attend the district's schools and subsequently moved or are no longer attending. This code can only be valid of the begin date and the end date are the same.

X. Changed spelling of name: changed the fund code, private facility code, birth date or begin date. The student is still receiving services and is listed on the current years's FACTS file.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

UNITED STATES CODE

20 U.S.C. Chapter 33, Subchapter I— General Provisions

Sec. 1400 Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Findings

The Congress finds that— . . .

(4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers; . . .

(c) Purpose

It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in Sec. 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities. . . .

Sec. 1401 Definitions

(a) As used in this chapter—

. . .

(20) The term "individualized education program" means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and whenever appropriate, such child, which statement shall include—

(A) a statement of the present levels of educational performance of such child,

Section 1412 Eligibility Requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

(2)(A) there is established

(i) a goal of providing full educational opportunity to all children with disabilities,

(B) a free appropriate public education will be available for all children with disabilities . . .

(C) all children residing in the State who are disabled, regardless of the severity of their disability,

and who are in need of special education and related services are identified, located and evaluated, ...

Section 1414 Application

(a) Requisite features

A local educational agency or an intermediate educational unit which desires to receive payment under Sec. 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—

. . .

(1)(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are disabled, regardless of the severity of their disability, and are in need of special education and related services will be identified, located and evaluated . . .

Sec. 1415 Procedural safeguards

. . .

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to—

. . .

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section.

. . .

(e) Civil action; jurisdiction

. . .

(2) In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3)(A) Except as provided in subparagraph (B), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(B)(i) Except as provided in clause (iii), if the proceedings conducted pursuant to this section involve a child with a disability who is determined to have brought a weapon to school under the jurisdiction of such agency,

then the child may be placed in an interim alternative educational setting, in accordance with State law, for not more than 45 days.

(ii) The interim alternative educational setting described in clause (i) shall be decided by the individuals described in sec. 1401(a)(20) of this title.

(iii) If a parent or guardian of a child described in clause (i) above requests due process hearing pursuant to paragraph (2) of subsection (b), then the child shall remain in the alternative educational setting described in such clause during the pendency of any proceedings conducted pursuant to this section, unless the parents and the local educational agency otherwise agree.

Individuals with Disabilities Education Act Amendments of 1997 (H.R.5)

SEC. 612. State Eligibility

(a) IN GENERAL—a State is eligible for assistance under this part for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:

(1) FREE APPROPRIATE PUBLIC EDUCATION

(A) IN GENERAL—A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school. . . .

SEC. 614. Evaluations, Eligibility Determinations, Individualized Education Programs, and Educational Placements.

. . . (d) INDIVIDUALIZED EDUCATION PROGRAMS

(1) DEFINITIONS—As used in this title:

. . .

(B) INDIVIDUALIZED EDUCATION PROGRAM TEAM—The term 'individualized education program team' or 'IEP Team' means a group of individuals composed of—

(i) the parents of a child with a disability;

(ii) at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

(iii) at least one special education teacher, or where appropriate, at least one special education provider of such child;

(iv) a representative of the local educational agency who—

(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(II) is knowledgeable about the general curriculum; and

(III) is knowledgeable about the availability of resources of the local educational agency;

(v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);

(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability. . . .

Individuals with Disabilities Education Act Amendments of 1997 (H.R.5), Title II

Miscellaneous Provisions

Section 201 Effective Dates

(a) *Parts A and B*

(1) *In general*

Except as provided in paragraph (2), parts A and B of the Individuals with Disabilities Education Act, as amended by Title I, shall take effect upon the enactment of this Act.

29 USC Chapter 16 Rehabilitation Act of 1973

Section 794 Nondiscrimination under Federal grants and programs: promulgation of rules and regulations

(a) No otherwise qualified individual with a disability in the United States, as defined in Sec. 706(a) of this title,

shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

ILLINOIS COMPILED STATUTES (ILCS)

105 ILCS 5/10-22.6(D)(1996) Suspension or expulsion of pupils

(d) The board may expel a student for a definite period of time not to exceed 2 school years, as determined on a case by case basis . . . Expulsion or suspension shall be construed in a manner consistent with the Federal Individuals with Disabilities Education Act [20 U.S.C. §1400 et seq.]. . . .

CODE OF FEDERAL REGULATIONS (CFR)

34 CFR 104.35 Evaluation and placement

(a) *Pre-placement evaluation*

A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

. . . .

(c) *Placement procedures*

In interpreting evaluation data and in making placement decisions, a recipient shall (1) rely upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with 104.34.

34 CFR 300.342 When individualized education programs must be in effect.

(a) At the beginning of each school year, each public agency shall have in effect an IEP for every child with a disability who is receiving special education from that agency.

(b) An IEP must—

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under Sec. 300.343.

34 CFR 300.343 Meetings

(a) *General*

Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising the IEP of a child with a disability (or, if consistent with State policy and at the discretion of the L.E.A. and with the concurrence of the parents, an individualized family service plan described in section 677(d) of the Act for each child with a disability, aged 3 through 5).

34 CFR 300.344 Participants in meetings

(a) *General*

The public agency shall insure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to Sec. 300.345.

(4) The child, if appropriate.

(5) Other individuals at the discretion of the parent or agency.

34 CFR 300.345 Parent participation

(a) Each public agency shall take steps to ensure that one or both of the parents of the child with a disability

are present at each meeting or are afforded the opportunity to participate, including—

(1) Notifying parents of the meetings early enough to insure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b)(1) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting and who will be in attendance.

34 CFR 300.533 Placement procedures

(e) The evaluation is made by a Multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in that area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

34 CFR 300.534 Reevaluation

Each LEA and SEA shall ensure—

. . .

(b) That an evaluation of the child, based on procedures that meet the requirements of Sec. 300.532, is conducted every three years, or more frequently if conditions warrant, or if the child's parent or teacher requests an evaluation.

ILLINOIS ADMINISTRATIVE CODE (IAC):

23 IAC 226.535 Case Study Evaluation Components

The child shall be given a case study evaluation appropriate to the nature of the problems which caused the referral. . .

c) For all other children, a comprehensive case study shall be conducted. This evaluation shall include, but need not be limited to:

. . .

9) Specialized evaluations specific to the nature of the child's problems.

B) An appropriate medical examination by a physician licensed to practice medicine in all of its branches shall be obtained, for any child with either a suspected physical, health, vision or hearing impairment . . .

23 IAC 226.540 Case Study to be Nondiscriminatory

. . .

f) Each local district shall insure that:

. . .

4) No single procedure is used as the sole criterion for determining an appropriate education program for a child; and

5) The evaluation is made by a multidisciplinary team, including at least one teacher or other specialist with knowledge of the area of suspected disability. . .

6) The child is assessed in all areas of suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

23 IAC 226.550 Formulation of Program and Service Options

Upon completion of a comprehensive case study evaluation (See Section 226.540 (c)) one or more conferences shall be convened for the purpose of formulating program and service options. This may or may not be the conference at which the IEP is developed. If not, an additional meeting is to be held, in accordance with Section 226.560.

a)

1) Participants in the conference shall include appropriate representatives of the child's local district of residence; the special education director or designee who is qualified to provide or supervise the provision of special education; all those school personnel involved in the evaluation of the child; the parent(s); other persons having significant information about the child; and those persons who may become responsible for providing the special education program or service to the child; the child, where appropriate, and other individuals at the discretion of the parent or local district.

23 IAC 226.562 IEP Content and Parental Access

a) The IEP shall include, but is not limited to, the following:

1) A statement of the child's present levels of educational performance.

(2)

FILED
DEC 31 1997
CLERK

No. 97-599

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOHN DOE, by and through his parents and next friends, JANE DOE and JOE DOE, and the class of all others similarly situated,

Petitioners,

v.

BOARD OF EDUCATION OF OAK PARK & RIVER FOREST HIGH SCHOOL DISTRICT 200, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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27pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Individuals with Disabilities Education Act ("IDEA"), prior to its amendment on June 4, 1997, permitted a school district during an expulsion to discontinue educational services to a special education student whose misconduct was unrelated to his disability.

2. Whether the 1997 Amendments to the IDEA, which were enacted after the Seventh Circuit entered its judgment below, are prospective only and therefore inapplicable to this case.

3. Whether, prior to the 1997 Amendments, a school district that expelled a student for misconduct unrelated to his disability could lawfully discontinue educational services while due process proceedings were pending.

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OPPOSITION TO WRIT OF CERTIORARI

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on May 27, 1997. The Seventh Circuit's opinion is reported at 115 F.3d 1273 (7th Cir. 1997) and is included in the appendix to the Petition.

STATEMENT OF THE CASE

This case arose from a September 1994 decision by the Board of Education of Oak Park and River Forest High School 200 ("School District") to expel freshman John Doe ("Doe") for the remainder of the fall semester after he was found in possession of a pipe and marijuana while attending a school dance.

Although Doe was classified as learning disabled, by the time he enrolled as a high school freshman, he had been mainstreamed in all academic areas. At his mother's request and contrary to the recommendation of his elementary school staff, during his freshman year, Doe received limited special education services and undertook a normal academic load.

At the beginning of his freshman year, Doe was instructed as to the School District's regulations, including its prohibition of illegal substances on school grounds. Specifically, he received a copy of the regulations and he learned about the rule through his involvement on the school soccer team. In addition, on September 9, 1994, the rule was explained in Doe's homeroom class. Despite these warnings, later that same day (September 9), Doe

was found in possession of a pipe and a small amount of marijuana at a school dance. He was suspended for ten days pending consideration of expulsion in accordance with the School District's Code of Conduct.

On September 19, 1994, the School District convened two meetings concerning Doe's September 9 misconduct: one relating to special education and the other regarding disciplinary proceedings. Doe was represented by an attorney at both meetings. At the special education meeting, the staffing team concluded that there was no connection between Doe's learning disability and his bringing a pipe and marijuana to school.[1] At the expulsion hearing, Doe's attorney presented witnesses, cross-examined the School District's witnesses, and argued on Doe's behalf. After reviewing the hearing officer's report summarizing the evidence, the high school's Administrative Review Committee recommended that Doe be expelled in accordance with the Code of Conduct.

On September 22, 1994, the School District accepted the Committee's recommendation and Doe was expelled for the remainder of the fall semester. The next day, Doe filed a due process hearing request under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*. In December 1994, the Level I Hearing

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[1] The Petition does not present a fair summary of the facts. The Does cite solely to the Level II Hearing Officer's factual findings rather than those of the District Court (Petition at 5-7). The District Court expressly rejected the Level II findings and concluded, in accordance with the Level I decision, that the School District "possess[ed] adequate information with which to evaluate Doe at the September 19, 1994 [special education meeting]" (App. 47, 50).

Officer upheld the School Board's actions. Doe appealed and, in July 1995, the Level II Hearing Officer reversed the Level I decision.

On October 26, 1994, Doe and his parents ("the Does") filed an eight-count Complaint in the District Court in the Northern District of Illinois alleging that his expulsion violated his Fourteenth Amendment due process rights as well as other constitutional and statutory rights, including the IDEA.

On October 11, 1995, the District Court granted summary judgment in favor of the School District on the entire Complaint except Count VIII, which was the IDEA claim. The parties then filed cross-motions for summary judgment on Count VIII and the School District's counterclaim, which was filed on October 11, 1995, and which appealed from the Level II administrative decision. The District Court entered judgment in favor of the School District on all issues on July 10, 1996.[2]

On May 27, 1997, the Court of Appeals affirmed judgment in favor of the School District. The Seventh Circuit held that (1) the School District properly suspended educational services during Doe's expulsion because his misconduct was unrelated to his disability, (2) the stay-put provision of the IDEA was not implicated because Doe's misconduct was unrelated to his disability, and (3) the School District complied with the IDEA's due process requirements in connection with its decision to expel Doe.

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[2] In its July 10, 1996 ruling, the District Court reconsidered its judgment rendered on April 19, 1996, which was itself a reconsideration of its February 15, 1996 decision.

In addition, the Seventh Circuit rejected the Does' assertion that material issues of fact precluded granting summary judgment in favor of the School District. Specifically, the Does argued that the District Court committed reversible error in finding that evidence relating to "mitigating factors" was presented to the School District as part of Doe's disciplinary proceedings. Noting that it was "less than obvious" that the School District was required to consider any mitigating factors as a matter of law, the Seventh Circuit agreed with the District Court that Doe's defenses were adequately considered prior to expelling him.

On June 4, 1997, *after* the Seventh Circuit issued its opinion in this case, the President signed legislation that amended the IDEA. The 1997 Amendments revised the "fair and appropriate education" provision of the IDEA as follows:

> A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusively, *including children with disabilities* who have been suspended or expelled from school.

1997 Amendments to Individuals with Disabilities Education Act, § 612(a)(1) ("1997 Amendments" or "Amendments") (emphasis added).

On June 23, 1997, the Seventh Circuit ruled that the 1997 Amendments did not apply retroactively to the instant case and denied the Does' Petition for Rehearing.

ARGUMENT

I. Introduction.

As part of the School District's overall discipline program, which was in place when Doe was expelled, educational services to expelled students were totally discontinued. Pursuant to that policy, once the School District concluded that Doe's misconduct of bringing marijuana and a pipe to a school dance was unrelated to his disability, Doe was expelled for the remainder of the fall semester and his educational services were discontinued during that time. Given that his actions were not attributable to his disability, Doe was not entitled to be treated differently from other non-disabled students who were expelled for similar misconduct. The Does now petition this Court to review and reverse the decision of the United States Court of Appeals for the Seventh Circuit, which upheld the lawfulness of the School District's actions.

This Court should deny the Does' Petition for three reasons. First, the issues raised in this case lack the necessary legal significance to warrant the exercise of this Court's certiorari jurisdiction. Second, the 1997 Amendments to the IDEA are not retroactive and therefore did not apply to this case. Third, the Seventh Circuit correctly applied the IDEA, as it then existed, to the facts in this case.

II. The Seventh Circuit's Ruling That The School District Was Permitted Under The IDEA, As It Then Existed, To Discontinue Educational Services To Students Expelled For Reasons Unrelated To Their Disabilities Neither Raises An Important Recurring Legal Question Nor Conflicts With Decisions By This Court Or Other Courts Of Appeal.

Certiorari review is unwarranted in part because the Seventh Circuit's ruling will have little, if any, prospective effect on the rights of special education students other than Doe. Effective June 4, 1997, the IDEA was amended to "lead to a result different from the one reached [by the Seventh Circuit]" (App. 23). The Does' contention that, in the absence of review by this Court, "hundreds or even thousands of children in Illinois alone" will be adversely affected ignores the obvious effect of this significant statutory amendment (Petition at 12, n. 7).[3] Because of this change in the law, only students

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[3] Counsel Mary Denise Cahill's affidavit, which is attached to the Petition (App. 80-81), should be stricken for several reasons. First, it constitutes evidence outside of the record. *New Haven Inclusion Cases*, 399 U.S. 392 (1970) (refusing to consider newspaper articles which were not contained in the record); *see also DeTomaso v. McGinnis*, 970 F.2d 211, 214 (7th Cir. 1992) ("[a]n affidavit attached to a brief is not part of the record, and we order it stricken"). Second, the data purportedly obtained from the State Board of Education is inadmissible hearsay. Fed. R. Evid. 802. Third, the affidavit merely sets forth counsel's personal conclusions drawn from anecdotal data. *United States v. Armstrong*, ___ U.S. ___, 116 S.Ct. 1480 (1996) (rejecting affidavits which presented hearsay "statistics"). Finally, the meaning of the data referred to in the affidavit is unclear and therefore the data fails to support counsel's conclusory assertion that "more special education students were expelled without continuation of services after the District Court's ruling than before" (App. 81).

expelled prior to June 4, 1997 will be affected by the Seventh Circuit's judgment in this case. Review by this Court is therefore unnecessary because no recurring legal issue has been raised.

The Does' Petition should be denied also because the Seventh Circuit's decision in no way conflicts with this Court's rulings in *Honig v. Doe*, 484 U.S. 305 (1988), and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993). The Seventh Circuit's holding bears solely on the issue of whether school districts may cease providing educational services to students expelled for reasons unrelated to their disabilities. This Court has never addressed that issue.

In claiming that the Court of Appeal's ruling is contrary to decisions of this Court, the Does misrepresent this Court's reasoning in *Honig v. Doe* (Petition at 16). In *Honig*, this Court observed that when Congress adopted the IDEA, it was responding in part to earlier judicial decisions, including *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), which indicated that handicapped students with emotional and behavior problems were often being expelled from school for behavior caused by their disabilities. *Honig*, therefore, was limited to holding that students with disabilities may not be unilaterally expelled if their misconduct *is related to* their disabilities. As this Court stated,

> Today we must decide whether . . . state and local school authorities may nevertheless unilaterally exclude disabled children from the classroom for dangerous or disruptive conduct *growing out of* their disabilities.

Honig, 484 U.S. at 308 (emphasis added). The Seventh Circuit recognized that the Does sought to extend this

Court's decision in *Honig* to a far different situation, and it properly declined that invitation.

The Does' citation to *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), to assert a conflict is unavailing. In that case, this Court held that providing a sign-language interpreter to a special education student enrolled in a parochial school did not violate the Establishment Clause of the First Amendment. *Zobrest*, 509 U.S. at 10. Nowhere did this Court address the issue of the continuation of educational services to students during expulsions.

The Does' assertion that the Seventh Circuit's ruling in this case conflicts with decisions rendered by its sister circuits is also wrong. The only circuit courts that have directly addressed this issue, the Fourth and Ninth Circuits, reached decisions consistent with the Seventh Circuit, and held that nothing in the IDEA[4] prevented school districts from suspending educational services to students expelled for reasons unrelated to their disabilities. *Virginia v. Riley*, 106 F.3d 559 (4th Cir. 1997) (*en banc*); *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986), *aff'd as modified*, *Honig v. Doe*, 484 U.S. 305 (1988).[5]

The cases cited by the Does from other circuits that take a contrary view create no conflict because with respect to this issue they are dicta (Petition at 16-17). For example, in *S-1 v. Turlington*, 635 F.2d 342 (5th

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[4] Because the 1997 Amendments to the IDEA are not retroactive, *see* Section III, *infra*, references herein to the "IDEA" refer to the statute as it existed prior to the June 4, 1997 legislation.

[5] These cases are discussed in Section IV.A., *infra*.

Cir.), *cert den.*, 454 U.S. 1030 (1981), which was decided prior to this Court's ruling in *Honig*, the Fifth Circuit reviewed the sufficiency of a school district's determination that a student's misconduct was unrelated to his disability. On the broader issue of expelling special education students, the court simply concluded:

> We therefore find that expulsion is still a proper disciplinary tool under the EHA and section 504 when proper procedures are utilized and under proper circumstances. We cannot, however, authorize the complete cessation of educational services during an expulsion period.

Turlington, 635 F.2d at 348. *See also Kaelin v. Grubbs*, 682 F.2d 595, 600-02 (6th Cir. 1982) (citing to *Turlington*'s conclusory dicta); *Board of Education of the City of Peoria v. Illinois State Board of Education*, 531 F. Supp. 148, 151 (N.D. Ill. 1982) (same). None of these cases rules on whether the cessation of special education services is proper when there is no causal connection between the student's misconduct and his or her disability.

Accordingly, the Petition should be denied because there is no conflict between the Seventh Circuit's ruling in this case and decisions by this Court or other courts of appeal. Furthermore, as discussed in Section IV.A. *infra*, the Seventh Circuit's reasoning is consistent with that of its sister circuits.

III. The 1997 IDEA Amendments Are Not Retroactive And Therefore Cannot Be Applied To This Case.

This Court need look no further than the effective date of the Individuals with Disabilities Act Amendments of 1997 to confirm that the application of the statute to this

case would constitute retroactive application which runs afoul of the *Ex Post Facto* Clause of the United States Constitution. U.S. Const. art. I, § 9, cl. 3 and § 10, cl. 1. By its terms, the legislation is prospective only and it would be unjust for this Court to apply the new law retroactively to the School District's actions taken in September 1994.

As this Court has stated, the *Ex Post Facto* Clause is violated when a law is applied "to events occurring before its enactment." *Miller v. Florida*, 482 U.S. 423, 430 (1987) (citations omitted). Congress has stated quite clearly that amended Section 1412(a)(1)(A), which applies to disabled students suspended or expelled, is not retroactive. Pub. L. 105-17, Title I, Sec. 612, 111 Stat. 49 ("[e]xcept as provided . . . the Individuals with Disabilities Education Act, as amended by title I, shall take effect upon the enactment of this Act"). The 1997 Amendments became effective on June 4, 1997, *after* the Seventh Circuit issued its ruling on May 27, 1997. Furthermore, the conduct at issue occurred in September 1994, and the Does filed their lawsuit against the School District in October 1994. *See Heather S. v. State of Wisconsin*, No. 96-3340, 1997 U.S. App. LEXIS 24927, at n.1 (7th Cir. Sept. 16, 1997) (declining to apply the IDEA's 1997 Amendments where the events giving rise to the action occurred before the date of enactment); *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 247 n.1 (5th Cir. 1997) (same). Because the Amendments were not in place when the complained of conduct arose, when the lawsuit was initiated, or when the Court of Appeals rendered its decision, the application of the 1997 Amendments to this case would constitute retroactive legislation in violation of the *Ex Post Facto* Clause.

The Does concede, as they must, that courts should apply the law in effect at the time they render their decision (Petition at 22). For example, in *Bradley v. School Board of Richmond, et al.*, 416 U.S. 696 (1974), this Court concluded that the new legislation applied in that instance precisely because it became effective while the case was pending on appeal and *before* the court of appeals issued its decision. Here, in contrast, the 1997 Amendments were not in effect as of the issuance of the Seventh Circuit's judgment. For this reason, the Does' contention that, under *Bradley*, retroactive application of the Amendments is proper misses the mark.[6]

The Does contend that the legislative history of the 1997 Amendments demonstrates that Congress intended the new law to apply retroactively. As support, they cite Congressman Martinez' statement during a House debate on the 1997 Amendments that the new legislation "clarif[ies] Congressional intent" (Petition at 17, 18, 21). This argument fails on several grounds. First, this Court need not look to legislative history where, as here, the statute's language leaves no trace of ambiguity as to its effective date. *Landgraf v. UST Film Products*, 511 U.S. 244, 280 (1994) (where "Congress has expressly prescribed the statute's proper reach . . . there is no need to resort to judicial default rules"); *Bath Iron Works Corp.*

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[6] Furthermore, the Does' contention that retroactive application of the 1997 Amendments would not result in an unforeseen or additional obligation on the School District is disingenuous because, at the time of the School District's conduct, the only decision on this issue, *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986), *aff'd as modified, Honig v. Doe*, 484 U.S. 305 (1988), permitted discontinuation of educational services under the same circumstances. *See* Section IV.A., *infra*.

v. Director, Office of Workers' Compensation Program, 506 U.S. 153 (1993) (where text of statute is unambiguous, reviewing court accords no weight to senator's remarks during Senate floor debate). Second, the remark in no way mandates application of the Amendments to conduct which occurred three years prior.

Retroactive application of the 1997 Amendments is further unwarranted because doing so would impose an obligation on the School District which did not previously exist regarding the provision of services to expelled special education students under certain circumstances.[7] In September 1994, the School District expelled Doe for the remainder of the fall semester based upon misconduct that was not connected to his learning disability. From 1986 to May 1997, the three courts of appeal to consider the issue uniformly held that school districts could lawfully cease educational services to students expelled for reasons unrelated to their disabilities. *See* Section IV.A., *infra*. As of June 4, 1997, the IDEA states that "[a] free appropriate public education is available to all children with disabilities . . . *including children with disabilities* who have been suspended or expelled from school." 20 U.S.C. § 1412(a)(1)(A) (emphasis added). Because of this change in the law, the Seventh Circuit correctly conclud-

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[7] For this reason, the Does' application of this Court's *Bradley* factors is fatally flawed (Petition at 23). In asserting that "[t]he Board cannot claim that this is an unforeseen or additional obligation," the Does conveniently ignore rulings by the Fourth and Ninth Circuits and misconstrue the holdings of this Court and other courts of appeals. As set forth in Section IV.A., *infra*, the case law fully supported the Seventh Circuit's ruling that the IDEA did not require the continuation of educational services to students who are expelled for reasons unrelated to their disabilities.

ed that applying the 1997 Amendments to this case would have a "truly retroactive effect" because the School District would incur increased liability even though it acted properly under the law as it existed when the Does' claim arose in September 1994.

IV. The Seventh Circuit Correctly Concluded That The School District's Actions Complied With The IDEA As It Then Existed.

A. Prior To June 1997, The IDEA Did Not Require Continued Provision Of Services Or A Stay Of Placement To Students Expelled For Misconduct Unrelated To Their Disabilities.

The Seventh Circuit correctly held that nothing in the IDEA, as it then existed, prevented the School District from ceasing to provide educational services to Doe during his expulsion, once it determined that his misconduct was unrelated to his disability.

At that time, the IDEA did not impose, either expressly or implicitly, an obligation on school districts to continue educational services when students were expelled for misconduct which bore no causal connection to their disabilities. Rather, the IDEA required only that school districts "assure all children with disabilities *the right to* a free appropriate public education." 20 U.S.C. § 1412(1) (emphasis added). In contending that the School District's actions violated the IDEA, the Does focus exclusively on Congress' use of the word "all" in Section 1412(1). The Does assert that because Section 1412(1) of the IDEA referred to "all" children with disabilities, it prohibited a denial of services to any student, even when the student was expelled for misconduct totally unrelated

to his or her disability (Petition at 15). The Seventh Circuit correctly rejected this position, stating that:

> [T]he IDEA does not express an intent, either expressly or impliedly, to shield special education students from the normal consequences of their misconduct if that misconduct has nothing to do with their disabilities.

(App. 15). Where a student, like Doe, brought marijuana to school and there was no connection between his actions and his disability, the underlying purpose of the IDEA was attenuated as was any justification for the IDEA's encroachment on local school control. The Court of Appeals properly concluded that, by the same token, once the School District determined that Doe's misconduct was unrelated to his learning disability, the IDEA was no longer implicated and thus the stay-put provision did not apply.

In reaching its well-reasoned decision, the Seventh Circuit relied upon decisions rendered by its sisters in the Fourth and Ninth Circuits, the only other courts of appeal that directly addressed the issue at hand. *Virginia v. Riley*, 106 F.3d 559 (4th Cir. 1997) (*en banc*); *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986), *aff'd as modified*, *Honig v. Doe*, 484 U.S. 305 (1988). Both the Fourth and Ninth Circuits concluded that nothing in the IDEA required school districts to discipline disabled students differently from non-disabled students, when their misconduct was in no way attributable to their disabilities. As the Fourth Circuit stated in *Riley*, 106 F.3d at 568:

> [N]either the text of section 1412(1), the legislative history, nor the purpose of the IDEA even suggests, much less mandates with the clarity necessary to confirm that the Congress actually

> confronted and deliberately decided, that a state must continue to provide education services for disabled children after expulsion for misconduct unrelated to their disabilities.

Hence, once a school district determined through proper procedures that a student's misconduct was unrelated to his disability, there was no reason to restrict its authority to cease providing educational services.

The Does broadly proclaim that, because the IDEA was intended to prevent "unilateral exclusion" of students from classrooms because of their disabilities, one can infer that, when it enacted the legislation, Congress meant to prohibit all exclusions, under all circumstances, even when students engaged in misconduct unrelated to their disabilities (Petition at 15). Such an inference goes well beyond the statute's purpose, as it existed prior to June 4, 1997. The IDEA was designed to prevent the denial of access to a free public education *because of* a student's disabilities. *See Board of Education v. Rowley*, 458 U.S. 176 (1982) (referring to the purpose of the IDEA as one giving disabled children *access* to public education). Indeed, this Court spoke to precisely that issue when it prohibited the cessation of services for misconduct *growing out of* a student's disabilities in *Honig v. Doe*, 484 U.S. 305, 308 (1988).

As the Ninth Circuit stated in *Doe v. Maher*, 793 F.2d 1470, 1482 (9th Cir. 1986), *aff'd as modified, Honig v. Doe*, 484 U.S. 305 (1988),

> If a child's misbehavior is properly determined *not* to be a manifestation of his handicap, then the handicapped child can be expelled. This conclusion does not conflict with the [IDEA]. When a child's misbehavior does not result from his

> handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. Therefore, when a handicapped child is properly expelled, the school district may *cease providing all education services*—just as it could in any other case.

(emphasis added). Therefore, when a student engaged in misconduct that lacked any causal connection to his or her disabilities, before the 1997 Amendments, the IDEA was simply of no help.

The Does' reliance on the legislative history of the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518, is unpersuasive. The narrow focus of that legislation undercuts the Does' contention that the legislation can be read to prohibit the cessation of education services to students who were expelled for reasons unrelated to their disabilities (Petition at 19, n.10). In that legislation, Congress sought to reconcile the Gun-Free Schools Act of 1994, 20 U.S.C. § 8921, which required a lengthy expulsion for students who brought certain weapons to school, with the IDEA. The legislation directed, however, that nothing in the IDEA should supersede the Gun-Free Schools Act with respect to children whose misconduct is unrelated to their disabilities. This provision suggests Congress's recognition that a student who brought a gun to school for reasons totally unrelated to his disability may be treated differently than one whose conduct was a manifestation of his disability.

The Does' reliance upon opinion letters issued by the Office of Special Education Programs ("OSEP") is misplaced. Under well-settled administrative law, an agen-

cy's interpretation of a statute or regulation is not binding on a reviewing tribunal. *Batterton v. Francis*, 432 U.S. 416 (1977). As the Seventh Circuit stated in *Production Tool Corp. v. Employment & Training Administration*, 688 F.2d 1161, 1165 (7th Cir. 1982):

> Interpretive rules, in contrast, have only persuasive force. Such rules are entitled to varying degrees of deference or weight, but a reviewing court ordinarily is free to substitute its own view of the relevant statute.

Courts have discretion to substitute their own judgment on all questions of statutory interpretation, including interpretation of the IDEA's requirement of a free appropriate public education, 20 U.S.C. § 1412(l). *Virginia v. Riley*, 106 F.3d at 568. Therefore, the Seventh Circuit properly discounted the Department of Education's opinion on this matter. The rationale articulated by the Department of Education was no different or more illuminating than the arguments made by the Does. The Court of Appeals was justified in determining that OSEP's position was *ultra vires* and that no deference was required.

In the absence of direct support in the text or legislative history of the IDEA, the Does now seek to refer to legislative history from the 1997 Amendments to support their contention that the IDEA, as originally enacted, prohibited the cessation of services for expulsions unrelated to a student's disability. As this Court has noted, however:

> The interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.

Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 168 (1989). The comment in the Senate Committee Report that the 1997 Amendments were intended as a "clarification of current law" carries no weight. *E.E.O.C. v. Metropolitan Educational Enterprises, Inc.*, 60 F.3d 1225, 1229 (7th Cir. 1995) (noting that "[a] congressional report, even a conference report, is not legislation . . . and it does not change the law") (citations omitted), *cert. granted on other grounds*, ___ U.S. ___, 111 S.Ct. 1260 (1996). Hence, the legislative history of the 1997 Amendments fails to save the Does' claim.

B. The Seventh Circuit Correctly Concluded That The School District Complied With The Procedural Requirements Of The IDEA As It Then Existed.

The Does take issue with the Seventh Circuit's factual findings relating to whether the School District provided Doe with procedures sufficient to satisfy his Fourteenth Amendment due process rights. As a threshold matter, there is no cause for this Court to review the fact-bound question of whether the School District's actions complied with the IDEA because, in the absence of a circuit conflict or a question of importance, this Court's certiorari jurisdiction is not intended solely to correct an erroneous decision by a lower court. *United States v. Johnson*, 268 U.S. 220, 227 (1925) (noting that this Court "do[es] not grant a certiorari to review evidence and discuss specific facts"). In any event, the Seventh Circuit's conclusion that the School District complied with the procedural requirements of the IDEA was amply supported by the evidence.

In reviewing a special education decision rendered by an administrative agency, federal courts conduct a *de novo* review. *Gregory K. v. Longview School District*, 811 F.2d 1307, 1311 (9th Cir. 1987). While affording "due weight" to the hearing officer's conclusions, courts will independently review the record and base their decision on the preponderance of the evidence. *Id.*; 20 U.S.C. § 1415(e)(2).

The Seventh Circuit reviewed the evidence and ultimately agreed with the decision rendered by the Level I Hearing Officer. The Level I Hearing Officer reached the following conclusions regarding Doe's claim that the School District violated the IDEA by expelling him without first evaluating him for ADD or ADHD:

> There was testimony that [Doe's] conduct at times reflects a low self esteem, thus he will do something to look "cool" i.e., impress his peers. This was offered as an explanation for his possession and showing the bag of marijuana at the school dance . . . The psychologist, based on [Doe's] behavioral history and scholastic achievement, believed that [Doe] would behave spontaneously, impulsively, without being aware of the consequences of his action, but would have excellent control of his behavior when he understood the consequences of his action. [Doe] does know the difference between right and wrong. *I find that [Doe] did not act on impulse or spontaneously in this matter.* He had the marijuana for at least a day and had planned to bring it to the school dance. This was not a spontaneous act. [Doe] participated in a sport where the use of illegal substances was prohibited. Copies of those regulations were given to him and his parents and acknowledged by [Doe] and his parents. In

> addition, on the morning of the September 9, 1994, the rules of School District conduct were reviewed and [Doe] admitted to a school administrator that he was there at the time the rules of conduct were explained. *I find that [Doe] had every reason to know the serious consequences of his conduct regarding the possession of marijuana.*

(App. 68) (emphasis added). In making its findings, the Court of Appeals commented that, under the circumstances, "there was little likelihood that an ADHD evaluation would have affected the . . . determination that [Doe]'s misconduct was unrelated to his disability" (App. 17-18). The Level I Hearing Officer's conclusions were solidly supported by the documents and testimony admitted during the hearing and the Seventh Circuit agreed that the record compelled his conclusion.

Moreover, once the School District determined that Doe's misconduct of bringing marijuana and a pipe to a school dance was not caused by his disability, he was not entitled to a stay of placement pending his due process proceedings. As the Seventh Circuit concluded:

> [T]he "stay-put" provision of the IDEA is not implicated in a case like this, where the school district has made a reasoned determination following the procedures of the IDEA that a student's misbehavior is unrelated to his disability.

(App. 14). Therefore, the Does' contention that his expulsion was subject to the IDEA's stay-put provision is unavailing (Petition at 25).

CONCLUSION

In sum, the Petition failed to raise an important recurring legal question and there is no conflict between the Seventh Circuit and either this Court or other courts of appeal. Moreover, prior to the 1997 Amendments to the IDEA, the Fourth, Seventh, and Ninth Circuits uniformly held that school districts may cease providing services for special education students expelled for reasons unrelated to their disabilities. Therefore, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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